# THE PROBLEM OF AN INTERNATIONAL COURT OF JUSTICE

BY

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GERICHTSREFERENDAR IN DÜSSELDORF

TRANSLATED FROM THE GERMAN BY

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TO

JAMES BROWN SCOTT

UNITED STATES DELEGATE TO THE SECOND HAGUE CONFERENCE

IN RESPECT AND GRATITUDE

'May I say that while, fortunately for some of us, justice is tardy, I think it proper in a meeting such as this to say that you have in this room the man who more than all others devoted his energy, thought, time and wonderful capacity for work in the endeavour made by the United States delegation to work out a permanent judicial court at The Hague. The failure to carry the plan through was certainly the greatest possible success, because the project for the Court, which was his work, was unanimously recommended by the Conference. I suppose that in some way when the world demands this Court, some person will evolve a scheme by which its judges can be designated. I refer with great pleasure to one of my warmest friends, Dr. James Brown Scott, a member of the American delegation at the Second Peace Conference at the Hague.'

(Address by the Honorable William I. Buchanan, Delegate of the United States to the Second Hague Peace Conference, at the fifteenth Lake Mohonk Conference, 1909. *Report*, p. 53.)

In the spring of 1912 there was issued, in the German language, a book entitled *Der Staatenverband der Haager Konferenzen*, or as it may be rendered in English, *The Union created by the Hague Conferences*. This work is the first of a series of volumes under the general title *Das Werk vom Haag*, or *The Work of The Hague*, published by Messrs. Duncker and Humblot of Munich and Leipzig, and due to the enterprise and devotion of Dr. Walther Schücking professor in the University of Marburg, Germany. The series, as a whole, was intended to make known the results of the First and Second Hague Conferences by publishing monographs dealing with the declarations, conventions, and recommendations, as well as the problems of the Conferences, so that the students and scholars of Germany might be furnished with all information essential to a correct understanding of the Conferences.

In the conduct of this enterprise Professor Schücking has secured the co-operation of the following well-known publicists: von Bar, Fleischmann, Kohler, Lammasch, von Liszt, Meurer, Niemeyer, Nippold, von Ullmann, and Wehberg. Thus far two volumes of the series have been issued, viz., the volume by Professor Schücking referred to above, and one by Dr. Hans Wehberg, entitled *Das Problem eines internationalen Staatengerichtshofes*, or *The Problem of an International Court of Justice*. A third work in three volumes, entitled *Judicial Decisions of the Permanent Court at The Hague*, is in process of publication, being a careful and accurate account of the cases which have

been tried by temporary tribunals formed from the Permanent Court since its establishment in 1902.

The present volume, which is Dr. Wehberg's monograph on the problem of an international court of justice, cannot be read by any one without admiration for the skilful manner in which he has discussed the various problems connected with an international court and without a feeling of gratitude for the balanced judgment and the spirit of fairness which he has displayed in the attempt to solve the problems connected with the proposed court, which are both many and difficult.

Dr. Wehberg approached the question of an international court of justice with considerable misgivings, and, in a previous publication, he declared himself to be a partisan of the so-called Permanent Court of Arbitration and opposed to the establishment of a truly permanent court composed of professional judges acting under a sense of judicial responsibility. Study and reflection, however, have convinced him of the necessity of the latter court, and the volume under review is calculated to strengthen the faith of those who believe in the proposed court and to persuade many doubters and waverers who are open to argument.

Dr. Wehberg believes that international law must be developed in order more adequately to meet the world's needs; that the conflicts inevitably arising between nations, in so far as they are of a legal character, can best be decided by a court of justice composed of permanent and professional judges whose duty it will be both to find and to apply the principle of justice decisive of the conflicts submitted to the court; and that such a tribunal can safely be entrusted to develop the system of law, as is the wont of courts, which it applies to the decision of concrete cases. He believes, and rightly, that the nations appearing before the court should

not be represented by judges upon the bench, as the presence of national judges is not only embarrassing in itself, but tends to question the impartiality of the decision. He is inclined to think that the framers of the so-called Permanent Court of Arbitration devised by the First Hague Conference did not intend to create a judicial tribunal; that their purpose was to provide machinery for the adjustment of a dispute rather than for its decision according to principles of law; and he cites on this point the views not only of delegates of the First but also of the Second Conference in support of his contention. The question is one of no little difficulty, but even if the partisans of the so-called Permanent Court of Arbitration meant it to be a judicial tribunal, Dr. Wehberg is very clear in his mind that it is not and that an international court of justice in the technical sense of the word should be created. The learned and industrious author approves the project of the Court of Arbitral Justice drafted by the Second Hague Conference, and his ninth chapter is a brief and serviceable comment upon it.

The undersigned has devoted much thought and attention to the question of a permanent international court of justice, and he commends this volume to the interested public as the best statement of the problems connected with the necessity and organization of an international court which it has been his fortune to read, and as calculated to advance the cause of judicial and therefore of peaceable settlement of justiciable disputes between and among the nations.

JAMES BROWN SCOTT,
*Director of the Division of International Law.*

WASHINGTON, D.C.,
*June* 29, 1917.

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*Proceedings—Proceedings of International Conference under the auspices of American Society for Judicial Settlement of International Disputes, December 15–17, 1910*, Baltimore.

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# CHAPTER I

## THE SOVEREIGNTY OF STATES AND THE INTERNATIONAL COMMUNITY

WITH the great development in the economic relations of states there has come about an increasing change in the conception of the position of the individual state within the international community. In previous centuries, when a state regulated its commercial relations with other states, it could proceed according to its own unhampered will. It might perhaps inflict an injury upon other states and thus bring upon itself the risk of war; nevertheless it was not on the whole dependent upon the political economy of other countries to such an extent as to be obliged to regulate its commercial relations with that object chiefly in mind. It could enter into and promulgate treaties after its own free will, as its sovereignty might dictate. In consequence, political scientists considered sovereignty as the highest attribute of the state, dependent upon no other. Sovereignty was, to the scholars of the old school, the first and most important characteristic of states.

But the situation of the individual states has entirely changed since world economy has created countless bonds between the hitherto isolated states, since commerce, industry, and the system of insurance, as well as numerous other institutions, have been built up upon international foundations. This economic interdependence of the individual states has continued to grow stronger and greater with each day. In his book, *The Great Illusion*,[1] Norman

[1] Leipzig, 1910, p. 44.

Angell has shown us that a failure of the Bank of England during a war between Germany and England would completely ruin German commerce. In place of the former isolated political economy of states, we have to-day a world economy upon which each state is in the highest degree dependent.

This daily increasing interdependence of individual countries, which brings about numerous points of contact between them, has induced states to enter into conventions with one another of an international character, regulating the legal relations between them and between their subjects. When we recall that before the year 1800 no international congress worthy of the name had met with the object of regulating the legal relations[1] of groups of states, and that, on the contrary, since 1815 about two hundred congresses of states with an ever-increasing number of participants have taken place, we recognize clearly the line of development, that an ever-stronger union of states upon a legal basis is coming about, and that the day is no longer far off when the most important fields of international interest will be ruled by law.

Can there be any doubt that the states which are still ruled by old political ideas agree, to some extent unwillingly, to bind themselves towards other states by international conventions? Will not sovereignty be more and more limited through the increase of international unions? Will not those conventions in many cases interfere with the administrative and legislative departments, and even with the judicial department, of the domestic government of states? If the legislative, administrative, and judicial activities of the individual states can no longer be regulated as each state chooses, will not the glory of sovereignty, which formerly was the chief characteristic of states, have

[1] Taken in contrast to political relations.

in large part disappeared? But while states enter into all those conventions with apparent willingness, there can be no doubt that at the present time the community of interests so far forces them to enter into such conventions that it is now a matter of necessity, not of choice. Which is to-day the stronger of the two, the community of interests or the selfish interest of separate states? Must not the latter yield more and more to the former? With irresistible force world economy is developing, and day by day the solidarity of interests is growing. The individual state is to-day no longer free to determine whether it will enter into a particular convention. As with all other states, its hand is forced by the community of interests. Von Liszt [1] says pertinently: 'The community of international law is the necessary consequence of a community of interests, which points out to the sovereign will of the individual state the way which it must go, if it is to survive.' It is true that this is not yet evident in all fields, because in many respects the interdependence of states upon one another has not yet become great enough; but to a greater or less extent it is true with respect to the regulation of postal and railway systems, the prevention of contagious diseases, the regulation of commercial relations, and numerous other affairs. Likewise, there can be no doubt that the community of interests, with each day that it becomes greater, is coming more and more to dominate states. In view of this power standing over it, every modern government must, paraphrasing the discerning words of Aristippus, say with resignation: ἔχομαι, οὐκ ἔχω (others rule me, it is not I that rule).[2]

[1] *Völkerrecht*, p. 10.

[2] Taken from an address of my former teacher, Paul Cauer ('Woher? und Wohin?', Düsseldorf, 1902, pp. 39 et seq.).

But it would be a serious mistake to conclude from the preceding statements that states have in any way lost their former significance. Though they are no longer sovereign in the old sense, their individuality as subjects of law (and this is of prime importance) has not been narrowed with respect to other states. When Bavaria and the other federal states renounced their sovereignty in favour of a united German state, they disappeared from the circle of independent states and retained only certain reserved rights. Henceforth Bavaria no longer stood upon the same footing as France, England, or North America. Granting that the establishment of the German Empire was on the whole for the good of Bavaria, she nevertheless lost by that glorious act her position in the world of states. But the diminution of the so-called sovereignty of states, in consequence of the influence of world economy, is of an entirely different character. Although the community of interests affects all states alike, still no state loses anything of its significance as a subject of law with respect to the other states; for the same bonds which bind it bind at the same time all other states of the international community. It will not be long before states, having put aside their old ideas, will recognize clearly how greatly their bonds are to their benefit; and in consequence they will be led to conclude further common conventions. But if it is inevitable that the law between states shall exercise an ever greater control, and if in this respect greater restrictions are placed upon the special characteristic of states, governments will come to a clearer recognition of the fact and will themselves take in hand the development and no longer let themselves be driven along by the current of events.

Thus far governments have concerned themselves much too little with the development of international law and

have been led to enter into negotiations only through important events which positively demanded a codification of principles. They have often failed to recognize the necessity of regulating anew their international relations and have only with difficulty been brought to adopt an advantageous convention, as in the case of the German Empire, in 1899, with regard to the establishment of the Permanent Court of Arbitration at The Hague. As a result of this attitude it has often happened that the initiative in important reforms has often come merely from private effort. I merely refer to the project of an arbitral court for disputes between individual persons and debtor states, as also to the proposal of a world bureau after the model of the Pan American Bureau.

To be thus driven on by circumstances is not in keeping with the high character of modern governments which, in regard to their own domestic affairs, have already entered upon elaborate schemes for the improvement of social conditions. They must become systematic in dealing with foreign affairs as well, and before hard necessity forces them they must ponder long over questions and develop plans for the future. Only thus can they put an end to the present unnatural position in which they are ruled by their ever-increasing common interests, and with proud consciousness say: ἔχω—καὶ ἔχομαι! (I am not only ruled by circumstances, but I likewise rule them!).

In his epoch-making book *Der Staatenverband der Haager Konferenzen*,[1] Schücking has pointed out that the idea of international organization is a marked feature of modern international law. In this connexion I may observe that this organization of states must be systematically and scientifically developed. Had this been done to a sufficient

[1] p. 18.

extent at the time, there would have been less obscurity in the discussions at the Hague Peace Conferences concerning the legal nature of the *Cour de la justice arbitrale*, and numerous other points.

The task of the science of international law is, by its preliminary labours, to assist and to guide governments in the making of international conventions. One of the most important problems of international law at the present day is the question of a truly permanent court of justice for disputes between states. No continental writer has thus far treated the question as carefully as it deserves to be treated, and in consequence it is a timely undertaking, before the next great Peace Conference, to attempt to throw light upon this problem which affects in the highest degree the welfare of states.

## CHAPTER II

### THE NECESSITY OF THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH INTERNATIONAL JUDICIAL DECISIONS

In his noteworthy work *Die Grundlagen des revolutionären Pacifismus*[1] (Tübingen, 1908), A. H. Fried has drawn the distinction between the reforming and the revolutionary pacifists. By the former he understands those who merely combat the symptoms of the disease, and by the latter those who, in addition, seek to overthrow the present false system of disorganization in the community of states. Similarly, the advocates of the judicial settlement of international disputes are taking two distinct attitudes. The one party looks no further than to settle in a peaceful way the existing disputes by means of arbitration, without considering whether, at the same time, the causes of the present differences are thereby removed. The other party is more far-sighted and seeks not only to settle present conflicts but also, through the gradual development of international law by means of international judicial decisions, to establish more securely the reign of law and thus prevent future disputes.

The pacific settlement of international disputes becomes easier in proportion as there exist legal principles upon which a decision may be based. International disputes frequently become acute because, in default of rules of international law, the parties have no basis of agreement

[1] Schücking aptly proposes (op. cit., p. 4) that the term '*organisatorischer Pacifismus*' [constructive pacifism] be substituted for the expression '*revolutionärer Pacifismus*' [revolutionary pacifism].

and their views are in complete opposition. Such disputes, persisting year after year, are indeed not without danger to the parties, even though they have for their object questions in themselves insignificant. Lammasch justly observes:

> When a dispute or when, it may be, several disputes between two states drag on for a long time, it can easily happen that from a comparatively trivial cause the breach between the two powers will become so wide that the continuance of their friendly relations will be seriously endangered.[1]

In fact, it is quite self-evident that international disputes must, so far as possible, not only be peacefully adjusted but must be decided upon a purely legal basis. If a legal question is decided in the form of a compromise by an arbitral court, and if a similar question later arises in a new dispute between two other parties, the latter have no basis upon which the dispute may be peacefully settled and mutual claims adjusted. For in the second case it may be that both parties, or one of them, are dissatisfied with a decision by compromise, because each state claims neither more nor less than is its due. Moreover, the first arbitral decision has done nothing for the solution of future differences, having merely settled the existing dispute. A decision according to equity, as Hartzfeld has recently suggested in his excellent book *Der Streit der Parteien*,[2] is only of value in private life where the legal principles to be applied are well established. But in international life, where much obscurity prevails concerning the rights and duties of states, a definitive decision according to principles of equity must lead to arbitrariness and confusion. How much more important it is then, in a definite case, to develop in a precise way the principles of inter-

[1] *Herders Staatslexikon*, vol. ii, 1909, p. 1408. [2] Berlin, 1911.

national law so that in all similar future disputes nations may be able to know what the law is, than to render an equitable decision, which may indeed settle the dispute in hand, but which leaves the legal problem involved in it in an obscure condition for the future.

But, one may object, should international disputes after all be settled upon a purely legal basis, so that in many instances one of the parties loses its case entirely? Is not the important thing the settlement of disputes, and is it not much better to compromise? Will not the state which loses regard the affair with bitterness and thenceforth make no further use of international institutions for the peaceful settlement of disputes? These objections appear to me unfounded. It must be accepted as a principle that through purely legal decisions the right and wrong of a dispute will be brought into clearer light. In that case, if a state is actually in the wrong it will more easily perceive it than in the case of arbitral decisions by compromise. But if, on the other hand, a state which is wholly in the right obtains only half its due, it will have all the more reason for dissatisfaction. A state which loses its case when international disputes are settled upon a purely legal basis may trust that at some future time, when another dispute arises in which it is itself in the right, it will win its case, and then it will not be satisfied with a decision in the form of a compromise. In addition to this it must be remembered that a state frequently loses its case completely even when international disputes are settled by friendly adjustment. In the decision of the Hague Court in the Savarkar case, France completely lost her suit, although the judges were less concerned to give justice than merely to settle the dispute in as friendly a way as possible. Only in strictly political disputes will

a settlement by compromise be resorted to. So far, we are in accord with the opinion of Hold von Ferneck in the *Zeitschrift für Völkerrecht und Bundesstaatsrecht.*[1]

On June 17, 1897, the Norwegian Prime Minister, Hagerup, declared in the Storthing that there were still many difficulties to be overcome in the matter of arbitration, and that the rules of law according to which decisions were rendered were still too uncertain, and that there was yet lacking a permanent international arbitral court.

In many cases it has appeared as a fact that the two parties were unwilling to turn over their dispute to an arbitral court, because they feared that an award in the form of a compromise would be rendered, instead of a legal decision. This point has been emphasized in particular by Root at the New York Peace Congress of 1907, and by Oppenheim in his work *Die Zukunft des Völkerrechts.*[2] In this connexion Marburg[3] and Th. R. White[4] make the pertinent observation that many disputes would be settled in a friendly way if the parties were certain that a purely legal decision would be rendered.

Kaufmann[5] is entirely in accord with us when he says that the future progress of the idea of arbitration depends less upon juristic questions and rules than merely upon the possibility of finding judges of such excellence that they can also be entrusted with questions which are not of secondary importance.

But, it will be asked, is international law as yet sufficiently developed to make a purely legal decision of the majority of questions possible? This question may, with the support of the majority of writers—in particular, Descamps,[6]

[1] 1912, p. 14.
[2] 1911, p. 49.
[3] *Proceedings*, p. xvi.
[4] *Report*, 1911, p. 105.
[5] *Das Wesen des Völkerrechts*, p. 4.
[6] *Denkschrift*, pp. 63 et seq

Mérignhac,[1] Lammasch,[2] and Nippold[3]—without hesitation be answered in the affirmative. Were this not the case, the two Hague Peace Conferences would not have laid it down that differences should be decided 'on the basis of respect for law'.

In particular, Professor Hyde[4] has convincingly shown that all the cases which thus far have been decided between the United States and other nations by means of arbitration could have been decided in a strictly legal manner.

While it would seem that a comprehensive codification of international law is not at present possible, its greatly increasing scope makes a gradual development of that science through legal decisions absolutely necessary.

What we also need is an international institution which will give purely legal decisions when the parties wish them. At the same time, decisions according to equity may continue to be given when the parties prefer to have recourse to them.

The plan does not naturally commend itself that the parties shall, as in the *Alabama* case, determine beforehand in the arbitral agreement what the arbitrators are to regard as the rules of international law in the dispute in question, as Saint-Georges d'Armstrong[5] has advocated. Not only is an understanding on this point exceedingly difficult, but such a procedure, which is similar to a compromise, will prevent the development of international law.

The solution, therefore, is: A further development of international law through international decisions! That this demand is justified there is a general consensus of opinion. In his article *Supériorité des arbitrages juridiques*[6]

[1] *Conférence*, p. 363. [2] *Deutsche Revue*, 1905.
[3] *Fortbildung des Verfahrens*, pp. 562 et seq.
[4] *Proceedings of the Second National Peace Congress*, 1909, pp. 221 et seq
[5] p. xvii. [6] *La Justice internationale*, 1903, pp. 209 et seq.

Manoel da Junqueira has definitely condemned compromises. Even Nippold, the German, who in his extreme caution is opposed to the question here at issue of a truly permanent court of justice, is forced to admit[1] that 'if substantive international law, unlike adjective international law, does not lend itself to codification, there is none the less need of its further development, and this, so we jurists hope, will be done not through codification, but rather through the judicial decisions of arbitral courts. That is the proper basis upon which, by means of rules determined by conventions and conferences, by means of partial codification, international law can best receive its further development. In this way the Hague Court of Arbitration, in particular, can be of special significance for international law, in that it can serve not only to settle disputes between nations, but also to develop international law.' Of the same opinion are Balch,[2] von Bar,[3] Descamps,[4] Lammasch,[5] de Louter,[6] Oppenheim,[7] Stanhope,[8] Zorn,[9] and others. In his opening address in the Orinoco case on September 28, 1910, Lammasch pointed out that national courts can only follow the laws in force in the individual states, whereas international courts have the task of creating the rules of international law.

This question was far too little discussed at the Second Hague Peace Conference. D'Oliveira[10] alone made the following pointed remark: 'Could we not confide to the Court the gradual codification of international jurisprudence?'

[1] Op. cit., p. 564. [2] *Revue de droit international*, 1908, p. 398.
[3] *Berliner Tageblatt*, 1907, vol. 22, p. viii. [4] *Denkschrift*, p. 53.
[5] Op. cit. [6] *Revue de droit international*, 1911, p. 157.
[7] Op. cit., p. 48. [8] *Union*, 1894, p 226.
[9] *Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit*, 1911, p. 40. [10] p. 616.

## CHAPTER III

### THE IMPOSSIBILITY OF A DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE PRESENT ARBITRAL PROCEDURE

#### 1. The Legal Nature of Arbitral Decisions according to the Text of the Hague Convention

We must accordingly insist upon this point, that it is possible for international law to be developed in the future through legal decisions. How can this best be done ?

In order to answer this question we must direct our attention to the arbitral processes of the present day and endeavour to determine whether they do not already answer the desired purpose, or, at least, are able to answer it, so that there is no need of a new institution for the attainment of our aim.

In his *International Law* [1] Baty has rightly pointed out that under the term ' arbitration ' in international law we understand to-day much more than the word originally and in its technical meaning properly conveys. As will be later pointed out, the mistake has often been made of confusing arbitration (a decision according to equity) with judicial settlement (a decision according to strict law), as practical institutions of present international law, and of joining them together under the common name of ' international arbitration '. There is then set up in contrast to these two forms of international procedure a method of procedure under the name of ' international judicial settlement ', which is of a Utopian character, and which is enforced by a supreme authority such as we

[1] 1909, p. 8.

possess in national law. In consequence great confusion has arisen. By arbitration in the strict sense we understand in general a decision according to equity by freely chosen judges. Pohl [1] speaks as follows:

> The arbitrator desires to settle the dispute and to satisfy the parties through a decision which will ensure peace. He decides the matter not according to law, but disposes of it *ex aequo et bono.*

There is no reason why this definition should be abandoned in international law. In my opinion, Baty [2] is wrong when he says that the chief characteristic of arbitration is merely the free choice of judges who possess the confidence of the disputants. If one compares arbitration with judicial settlement in international law—in national law there are even greater differences—the comparison can best be made by taking as a basis the objects of the two institutions and not merely the external form of the composition of the tribunal, which is a means to the end. The parties desire from the arbitrator a decision satisfactory to both sides, not one based upon the greater right, since their object is to dispose of the dispute. In consequence, they attach no importance to the point that the judges be jurists in the highest sense of the word, but choose any person at all in whom they have confidence. On the contrary, in judicial settlement, as we shall show later, there must be a permanent tribunal with permanent judges, because only such an institution can guarantee a decision according to strict law. We shall later mark out the distinctions between judicial settlement and arbitration, and the great differences they present. Here we must be content to call attention to the fact that the object of arbitration in international law is a decision according to equity, whereas the object

[1] *Deutsche Prisengerichtsbarkeit*, 1911, p. 208. [2] p. 3.

of judicial settlement in international law is a decision according to strict law.

Accordingly, when it is asked whether international arbitration is suited to the development of international law, the question must be answered in the negative if the arbitration we now have corresponds to the idea of arbitration in international law. Whether this is the case can best be determined if we take the Hague Convention for the pacific settlement of international disputes of October 18, 1907, as determining the present character of international arbitration. Article 37 of the said Convention reads:

> International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law.

In Article 38, paragraph 1, it is further enjoined:

> In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

These words make it sufficiently evident that the arbitral decisions of the present day are to be legal decisions. That is the general understanding, although Dr. Tettenborn, in her study on *Das Haager Schiedsgericht*,[1] speaks of 'the insecure basis of respect for law'. The statement of Descamps throws no light upon the question; but it is certain that the Hague Conference of 1899 intended to place the words 'on the basis of respect for law' in apposition with a decision according to equity, as Beernaert also pointed out at the Second Hague Conference,[2] in defence of the arbitral court set up by the First Peace Conference.

[1] 1911, p. 18.

[2] p. 332.

Moreover, there can be no doubt that by the terms of that convention we have at hand an international organ, the object of which is to give strictly legal decisions, and which in consequence seems to be well suited to the development of international law. Accordingly, it seems at first sight that we already possess in international law an actual system by which disputes can be judicially settled, and arbitration is in its essence abandoned. The name, however, of the present authoritative institution would in consequence be incorrect. But when Scott, in his excellent remarks concerning the Court of Arbitral Justice,[1] observes that 'it may be held that the foundations of a true court in the juridical sense of the word have been laid, except that in place of judges there would be arbitrators appointed by the free choice of the parties', we are taken aback, and we must set ourselves to examine whether in fact the present system is in its method that of judicial settlement. It may possibly be that what was considered as arbitration before the First Hague Conference was an institution by means of which disputes between states were settled upon a purely legal basis. In that case the Hague Conference would only have given expression to something already in existence, without changing it in any way. It is our duty, therefore, to examine whether the numerous arbitral awards rendered up to the present time have been in truth legal decisions.

## 2. The Element of Compromise in the Decisions thus far rendered by Special Arbitral Courts

In his excellent work, *Pasicrisie internationale*,[2] La Fontaine is obliged to pass, on p. 17, a severe sentence upon one of the oldest arbitral awards of the latter-day

[1] Vol. i, p. 348.

[2] Berne, 1901.

practice of arbitration. With respect to the arbitral award which was rendered by the Czar of Russia in the dispute between Great Britain and the United States regarding claims for indemnity on the basis of the *compromis* of October 20, 1818, La Fontaine observes:

> The award rendered by the Czar of Russia did no more than lay down a principle all too vague and indecisive. The two nations concerned decided to conclude a new convention and entrusted the dispute to two commissioners and two arbitrators.

With regard to the decision rendered about a year earlier by the commissioners appointed, in accordance with Article 4 of the Treaty of Ghent, to settle the dispute between Great Britain and the United States, de Lapradelle and Politis [1] observe:

> Although in form this decision appears to be a judicial one, it is at bottom only a compromise. . . . The commissioners were not as impartial as might have been desired. Each of them worked as far as he could for his own government, after the manner of a skilful lawyer, not that of a judge.

The arbitral award of the King of Holland, rendered in accordance with the *compromis* of September 29, 1827, in the dispute between Great Britain and the United States concerning the north-east boundary, is unfortunately too well known. 'In place of determining, in his award, the true point at issue,' remarks Calvo,[2] 'this sovereign left the question of law in suspense and confined himself to suggesting a basis of settlement of an entirely new and contingent character.' A similar opinion upon this decision is expressed by Kamarovski [3] in particular, and by Dennis.[4]

[1] p. 304. [2] *Le Droit international*, 3rd ed., 1880, vol. ii, p. 575.
[3] *Le Tribunal international*, pp. 202 et seq.
[4] *Columbia Law Review*, 1911, p. 496.

The parties mutually refused to accept the decision of the King of Holland. The American Minister, Gallatin, spoke as follows with regard to this and other disputes:

> An arbitrator, whether he be king or farmer, rarely decides on strict principle of law; he has always a bias to try if possible to split the difference.

The reasoning upon which arbitral awards were rendered, particularly in the first half of the last century, was regarded as of merely secondary importance. The important point was to obtain an adjustment of the dispute. This idea was carried so far that in La Fontaine alone there are twenty decisions of the last century referred to which were not published at all.[1] A decision in a dispute between the United States and Paraguay, in the sixties of the nineteenth century, was brought to light for the first time forty years later by La Fontaine. That decisions of that kind are of no value for the development of international law is self-evident. Nippold [2] and Wambaugh [3] rightly point out that the publication of these decisions is one of the essential conditions for the advantageous working of international courts, since only in this way can they exercise the requisite influence upon the development of international law. In recognition of this fact, all decisions of the Hague Permanent Court, together with the protocols, are bound together and sent gratis to interested parties. With respect to decisions of special arbitration courts, that has unfortunately thus far not been done. It would be greatly desirable that those decisions also which, according to Article 43, paragraph 3, of the Hague Convention for the pacific settlement of international disputes, must be communicated by the powers to the International Bureau of

[1] pp. 33, 34, 38, 40, 43, 56, 68, 69, 75, 232, 612, 615, 616, 617, 618.

[2] *Fortbildung des Verfahrens*, p. 566. [3] *Proceedings*, p. 142.

the Arbitration Court, should in like manner be published just as those of the Hague Court. The Division of International Law of the Carnegie Endowment has recently undertaken this commendable task, and has entrusted to Professor John Bassett Moore the task of editing all arbitral decisions. Moreover, the Interparliamentary Union, in its *Annuaire* for 1911, has taken the first step towards the publication of the decisions of special arbitral courts.

So few are the really well-reasoned decisions in the field of international arbitration in the past century, that La Fontaine feels called upon to draw special attention to six cases in which the decision is supported by sufficient grounds.[1] For example, in presenting the detailed decision which was rendered, in accordance with the convention of July, 1863,[2] by the commission in the dispute between England and Peru, he speaks as follows:

> This decision is of particular interest because of the care with which it was drawn up, and the detailed reasons which it contains, in contrast with the majority of the decisions which we have thus far presented.

If out of 170 decisions in the nineteenth century only six can be singled out as based upon good grounds, the facts speak for themselves. It is accordingly not surprising that the arbitrators appointed in accordance with the *compromis* of July 11, 1839, in the dispute between Mexico and the United States, were not agreed whether they were to act as a legal tribunal or as a diplomatic body.[3]

De Lapradelle and Politis,[4] whose knowledge of the arbitrations of the period from 1798 to 1855 is so profound, deny positively that arbitration has done anything for the

[1] pp. 27, 46, 47, 62, 245, 385.
[2] p. 47.
[3] Mérignhac, *L'Arbitrage*, p. 53.
[4] pp. xliii et seq.

development of international law. In their opinion, the arbitrators of that period oscillated between compromise and mediation. Neither of the two principal forms of arbitration from 1798 to 1855—mixed commissions of inquiry or the arbitral awards of sovereigns—exercised any perceptible influence in the development of law. The sovereigns supported their decisions with brief and unsatisfactory arguments, and rendered awards more in the form of a compromise. It is quite characteristic that de Lapradelle and Politis, after having reached that conclusion in all the six cases in which sovereigns had decided between 1798 and 1855, instead of stopping to discuss this exceedingly interesting problem of international law, continue as follows:

> But these questions of law, important as they were, were thus handled: the first was set aside, the second misunderstood, the third not considered closely, the fourth and fifth misconstrued, and the sixth given a diametrically wrong application.[1]

In contrast with the decisions of sovereigns, the members of mixed commissions gave detailed reasons for their decisions. But since they were rarely jurists they lacked the necessary ability, and their decisions are incomplete. In consequence, de Lapradelle and Politis express the following opinion upon the period up to 1855:

> The authority which arbitration might have exercised upon the law was greatly lessened. The lack of ability on the part of those who drew up the decisions discredited arbitration in the eyes of jurists, which was a serious matter at a time when text-books had, for two centuries at least, exercised absolute sway over international law. Authors do not cite the decisions of commissioners, and commissioners never fail, on the other hand, to hunt up and cite the authors.... Arbitration was at that time from a legal point of view much more the pupil than the master.

[1] p. xlv.

Likewise in the later period of modern arbitration, which began with the celebrated *Alabama* case, the situation remained unchanged. Even the *Alabama* case was not settled in a precisely legal manner, as Marburg [1] points out. England agreed that the tribunal should take as the basis for its decision the three so-called rules of the Treaty of Washington, declaring at the same time that those rules were not at all a statement of principles of international law in force at the time, but that she accepted those rules in order to give a proof of her desire to strengthen the friendly relations between the two countries. Granting that this was done because England did not wish to admit publicly that she was in the wrong, and that the rules of the Treaty of Washington were in truth principles of international law, so that the *Alabama* arbitral court gave a fair decision upon the basis of existing international law, and not upon the basis of a fictitious law, that fact proves nevertheless that the parties were not at all concerned to determine their legal rights, but that they were desirous to dispose of the dispute exclusively by means of an equitable decision. That the arbitrators confined themselves to the limits imposed is self-evident. Shortly after, the celebrated *Springbok* case between the same parties was settled by arbitration, in accordance with the above-mentioned Treaty of Washington. The decision in this case, given clearly upon political grounds, in recognizing the doctrine of continuous voyage, ran counter to established principles of international law, and called forth a protest from all jurists, in particular from the Institute of International Law, which, at its meeting at Wiesbaden, expressly protested against the decision. The decision in the case of the *Circassian*, likewise rendered in accordance with the

[1] *Proceedings*, p. xiv.

Treaty of Washington, was not accompanied by any extensive opinion of the court.

In this manner were the majority of cases decided. In many cases also, the legal basis of the dispute was so weak that the arbitrators were expressly authorized to compromise. This was particularly the case in the dispute between France and Holland concerning the boundary of Guiana-Surinam.[1] In like manner, the numerous cases in which sovereigns acted as arbitrators show that the parties were exclusively concerned with the adjustment of the dispute, not with a strictly legal decision. If, as in the *Phare* case, settled by the French Court of Cassation, and in the Butterfield case, settled by the English Ambassador Monson as sole arbitrator, the legal questions were, though in too little detail, relatively well decided—in the first case the question of *res iudicata*, and in the second case the question of prescription in international law,—yet these facts prove nothing to the point. The conclusion is rather that even an arbitrator may decide according to rules of law. But the great distinction between the strictly legal settlement of disputes and the settlement by arbitration, or rather mediation, consists in the fact that a judge must apply the rules of strict law, whereas an arbitrator is left free to apply them or not, as Baldwin[2] also points out. An arbitrator may never be forbidden to decide according to the rules of equity. Were he so forbidden, there would be nothing left of the purely arbitral settlement of disputes.

Moreover, the publication of the decision in the *Alabama* case was not followed by a general publication of decisions. As late as 1892, Rouard de Card[3] emphasized

[1] As also more recently in the dispute between Peru and Bolivia. See *Zeitschrift für internationales Recht*, 1910, pp. 205 et seq.

[2] *The New Era of International Courts*, 1910, p. 7. [3] p. 124.

the fact that he could find no trace of the arbitral award rendered in 1881 in the dispute between Holland and San Domingo relative to the Dutch ship *Havana Packer*, although it was rendered in France by the President of the French Republic. He made the same observation with respect to the decision in the dispute between the United States and Haiti with regard to the Lazare case: 'We have not been able to procure the arbitral decision.'[1] The decision pronounced by Baron Lambermont on August 17, 1889, in the dispute between Germany and Great Britain over Lamu Island, was first published a year later, namely, on August 28, 1890.

What conditions were still possible in recent times may be gathered from the fact that in the arbitral court established in accordance with the *compromis* of January 4, 1883, between Chile and England, one of the three arbitrators, a national of Chile, from the very start protested against every decision unfavourable to his country. This ideal judge made public the secret deliberations of the arbitral court without further ado. The subsequent president of the arbitral court, Lafayette, a Brazilian, in contrast with the former president of the arbitral court, the Brazilian Netto, took sides with his Chilean colleague and decided that offences committed by soldiers in violation of the laws of war without the command of their officers gave no ground for indemnity, although the contrary was undoubtedly the case. The result was that the arbitral agreements concluded by Chile with numerous other states were never carried out, and the great powers of Europe who claimed indemnities of Chile for injuries suffered during the war with Peru preferred to settle the disputes through diplomatic negotiations.

[1] p. 133.

The arbitral award rendered in 1885 in the dispute between the United States and Haiti, relative to the American ship *William*, furnishes a further characteristic example. The United States won the case, but Haiti protested. The American Secretary of State recognized that the decision was unfair, and made a declaration to the effect that the American citizen Pelletier, whose rights were involved in the case, had no claim against Haiti; and accordingly the affair gave rise to no judicial or diplomatic proceedings. The fact that in this case the successful party regarded the decision as unfair and repudiated all rights resulting from it, shows clearly how little concern the judges in that case had to render a decision unassailable from a legal point of view.

That even in the important decisions of recent times the principles remain the same is shown by the fact that at the First Hague Peace Conference, Martens, who at that time frequently acted as arbitrator, forcibly stated as his opinion that arbitration merely sought to dispose of disputes, and that accordingly the legal basis was secondary and superfluous.[1]

The famous arbitral court which dealt with the Bering Sea fisheries rendered, on August 15, 1893, merely an award by compromise, as Balch[2] has clearly put it: 'The decision, taken as a whole, was a compromise.' But at that time this was regarded as entirely natural, and it is not to be wondered that Renault,[3] and also Barclay[4] speak of the decision as an excellent one because of the fact that it

[1] See my remarks concerning 'Friedrich v. Martens und die Haager Friedenskonferenzen' in *Zeitschrift für internationales Recht*, 1910, p. 349.

[2] *Revue de droit international*, 1908, p. 389.

[3] *Revue générale*, 1894, p. 44.

[4] *Revue de droit international*, 1893, p. 444.

was a compromise and declared neither party wholly in the wrong. Renault speaks as follows:

> The decision rendered on August 15, last, by the arbitral tribunal contains only the answers made by the whole body or the majority of the arbitrators to the questions set forth in the *compromis* of February 29, 1892, but the reasons are not given for these answers,—the provisions of the award are not fully conformable to the claims of either of the parties, whose interests the arbitrators naturally sought to reconcile as far as possible.

In like manner Barclay speaks:

> In following the example of King Solomon and in rendering an award which met half the claim of each of the parties, the arbitrators conformed to a precedent of ancient wisdom.

But shortly after the publication of the decision in the Bering Sea case, the American counsel, Carter, wrote as follows to the Secretary of State of the United States with respect to that decision:

> Compromise of some sort seems to have been the necessity of the situation; and when this is said, it means that the tribunal was no court at all, but a body of men aiming to reach a solution which would either equally please, or equally displease, the contending parties. Our friend Judge Hoar of Massachusetts is said to have observed that the circumstance which he felt to be the most disagreeable to him in his official life was that he was never able to decide against both the parties. A place on the present tribunal would have suited him to a charm.

In his report[1] to the Universal Peace Congress held at Antwerp in 1894, Hornby enumerates not less than eight important questions of law which the arbitral court in the Bering Sea case had undertaken to answer.

[1] *Official Report*, p. 141.

Under these circumstances it is a fact worthy of special note that Baron Lambermont, in transmitting to Germany and England his decision relative to Lamu Island, rendered on August 17, 1889, expressly emphasized the point that he had decided the case as a judge and not as a mediator.

The award which Martens rendered in 1897 in the dispute between England and Holland, relative to the ship *Costa Rica*, was anything but a strictly legal decision. As was his wont, Martens allowed political reasons to figure largely in his arbitral decisions. Even at this day, after almost fifteen years, the decision of Martens relative to the ship *Costa Rica* is the object of general indignation in Holland.

The far more important decision, on October 3, 1899, of the Venezuelan arbitration court, which sat at Paris under the presidency of Martens, was in its essence only a compromise. Although five celebrated jurists occupied themselves for several months with the boundary dispute between England and Venezuela, and although numerous and complicated legal questions were involved in the dispute, the award covers only two small printed pages. That the award was a compromise is generally recognized. The *Revue générale* [1] speaks as follows :

> The arbitral tribunal appears to have satisfied the two parties. Venezuela, in fact, saw the British claims cut down, and Great Britain obtained the acknowledgment of her rights over a vast territory.

General Harrison, Foster,[2] and Dennis [3] hold the same view.

As Martens was regarded as the most distinguished

[1] 1901, p. 79.

[2] *Proceedings of the American Society of International Law*, 1909, p. 30.

[3] *Columbia Law Review*, 1911, p. 485.

representative of international arbitration in the whole world—a fact pointed out in particular by Holls at the First Hague Conference—it is quite natural that the other arbitrators of that period adopted his attitude. Accordingly we see that even in recent times a strong emphasis is still placed upon the element of compromise in international arbitration. The decision of the King of England, rendered on November 20, 1902, in the dispute between Chile and Argentine is accompanied by no opinion at all. Again, Riddell, for example, a member of the Canadian High Court of Justice, speaks as follows of the decision rendered on January 24, 1903, between Great Britain and the United States in the Alaskan dispute: 'It was felt that the decision was not a judicial decision on the merits, but that the result was based upon diplomatic grounds.' [1] The observation was made at the time that 'not many more cases of that kind are needed to bring arbitration into discredit'.

The distinguished French jurist, Fauchille, in 1906, criticized in the same way [2] the decision rendered by the King of Italy in the boundary dispute between Brazil and Great Britain. He declared at the time:

> In acting as he did the King of Italy assumed the position of friendly compositor, although the arbitral agreement did not actually give him the right to do so. It was only according to the rights recognized as possessed by one or the other party that the arbitrator should have determined the boundary line of Guiana.

How little such decisions meet with the wishes of the parties is shown by the consequences of the arbitral award rendered in June, 1911, in the Chamizal case between

[1] *Proceedings*, p. 34; see also Balch in *Revue de droit intern.*, 1904, p. 39.

[2] *Revue générale*, p. 139.

Mexico and the United States. As the national judges were unable to come to any agreement, the decision of the arbitrators awarded to each of the parties by compromise half of the territory, the ownership of which, by reason of a change in the bed of the Rio Grande, was disputed. Neither government was satisfied with this decision, so that the parties intend either to submit the case to the Hague Court or to settle it by diplomacy. Fried[1] rightly remarks in this connexion:

> The whole case speaks against the method of mixed commissions and the arbitral settlement of such disputes. It makes the necessity of an international and impartial court of justice all the clearer.

At the Second Hague Conference, Barbosa,[2] the great advocate of a freely chosen arbitral court and the opponent of a permanent court of justice, expressed himself as follows:

> I refer you to the case of the *Costa Rica Packet* in 1897, to the boundary dispute between British Guiana and Venezuela in 1899, and to the Venezuelan dispute of 1904. The decisions in these three cases have been sharply criticized in the international reviews and elsewhere by the most eminent authorities upon the subject; and the second case, which seriously menaced the territorial integrity of my country, gave rise to an energetic protest from its government.

In his treatise, *International Arbitral Law and Procedure*, which appeared in 1910, Ralston has arranged according to the subject-matter the legal principles which international arbitral courts have thus far laid down. The contents of the book show how contradictory the decisions of arbitral awards have been and how meagre the judicial

[1] *Friedenswarte*, 1911, p. 254.

[2] p. 342.

opinions accompanying them. In his review of Ralston's work in the *American Journal*[1] Borchard justly observes: 'On many subjects, it is practically impossible to reconcile the conflicting decisions of arbitral tribunals.'

### 3. The Element of Compromise in the Decisions of the Hague Permanent Court of Arbitration

If in the following pages I shall sharply criticize the decisions of the Hague Court of Arbitration, it becomes me to lay special stress in advance upon the conspicuous ability of those men, such as Lammasch, Renault, de Savornin Lohman, Hammarskjöld, Fry, Fusinato, Beernaert, Asser, Gram, and others, who rendered those decisions. What they have done by their skill as arbitrators to make the Hague Court better appreciated is a matter of history. Accordingly, I direct my remarks exclusively against the prevailing system of compromise according to which those decisions were admirably, and in some cases masterfully, decided. I do not advocate better arbitrators—for where can we find more able men—but merely a better system for the settlement of international disputes.

As regards the first decisions of the Hague Court down to the time of the Second Hague Conference, in the dispute between Mexico and the United States there were only the questions of *res iudicata* and of prescription to be settled. The arbitral court settled both summarily. In particular the question of prescription in international law was not studied with sufficient care, although the arbitrators felt called upon to express themselves in detail upon it. The arbitral court acted as if there were no literature at all upon this subject. If one compares a decision of the

[1] 1911, p. 536.

German Imperial Court with this decision we are impressed most favourably with the consideration shown by the national courts for judicial decisions and for the literature of the subject. But in the decisions of the international courts there is rarely any reference to earlier decisions. The question of prescription had been passed upon already in numerous arbitral awards, and in the field of literature that interesting question had been treated in particular by Rolin-Jaequemyns[1] and by Mérignhac,[2] in connexion with the Butterfield case.[3] In the Hague decision it is merely stated that national laws as to prescription can have no application in international law. But, with the exception of the Butterfield case, the existence of the rule of prescription in international law had been constantly affirmed by the eight international arbitral courts, which before 1902 had passed upon the question of prescription in international law.[4] It was by that principle that the American-Venezuelan Commission of 1889 justified its award in the Williams case in a fairly detailed opinion. But the Hague arbitration court refused to take a stand upon the point. It should also have at least been proved why there was an international dispute involved in the case, since the United States had merely undertaken to support the rights of private persons. The searching criticism of this decision in *La Justice internationale*[5] regards it as very doubtfully correct, and declares that the arbitral court abandoned the strictly legal point of view in this case and took its stand upon the ' ground of arbitral equity '. In thus ignoring previous arbitral awards, and in

[1] *Revue de droit international*, vol. xxii, p. 361.
[2] *L'Arbitrage*, 1895, p. 123.
[3] See also Rouard de Card, p. 129 ; Dreyfus, p. 184.
[4] Moore, pp. 1205, 3130, 3139, 3210, 4181, 4199 et seq.
[5] Vol. i, p. 31.

disdaining to consult the literature of the subject, it is impossible to build up an international judiciary with fixed traditions and authority. Theory and practice must work together if anything useful is to result. But how can this be the case if in practice theories are thrown aside as worthless? As a matter of fact, the decision of the Hague court, rendered by five prominent international jurists, because of its lack of proof had so little moral force that in the following year, 1903, the Venezuelan commission in the Gentini case declared that the principle of prescription was 'well recognized in international law'.[1] How can theory develop and carry on the rules laid down by practice, when it never occurs to international judges to state their reasons, and when, on the contrary, they act as legislators? Under such conditions will not a breach hurtful to the development of international law be made from the start between theory and practice? Do not the numerous attacks to which international arbitral courts have with few exceptions been constantly subjected, now become intelligible? We are unfortunately obliged to criticize in almost all recent international decisions the disregard of theoretical works. Thus far the Hague Court is without a library, which, as the highest international arbitral court, it undoubtedly should have.

In fact, we may to-day hold up before the judges of the Hague Court as a standard what, in 1890, Saint-Georges d'Armstrong wished to see enjoined upon the members of the Academy of International Jurists advocated by him as a duty in their legal decisions: 'Before pronouncing upon a question the arbitrators should investigate and take into account the numerous precedents which we have mentioned, such as the diplomatic books, referred to

[1] Ralston, *Venezuelan Arbitrations of 1903*, p. 720.

in the several countries by different colours, which contain all the official notes exchanged between two or more governments upon a single subject; such as the character of positive laws, the resolutions of international congresses and conferences, arbitral awards of which there is knowledge, and the decisions of prize courts; such as, moreover, the principles admitted by the majority of nations and embodied in their treaties, as also the principles laid down by writers of highest authority in matters of international jurisprudence, and those, more general in character, of customary law.' [1]

The decision of the Venezuelan arbitral court has likewise contributed nothing at all to the development of international law. Mallarmé [2] has passed the following judgment upon it:

> It was a question of law that was above all at issue in the case. The court should have kept to it, and not descended to the rôle of a commission of inquiry interpreting the particular facts of diplomatic negotiations. The decision lacks force and authority, because the grounds upon which it rests are merely considerations of fact which may easily be contested.[3]

The decision of the Hague court in the dispute between Japan and the European states was likewise drawn up in the relatively brief form of previous arbitral awards. That this tribunal also regarded itself more as a body of arbitrators than as a real court, is shown by the fact that one of the three judges, Motono, recorded his dissent in signing the award.

[1] Op. cit., p. xv.

[2] *Revue générale*, 1906, pp. 496 et seq.; see also the criticism expressed in *La Justice internationale*, 1904, pp. 9 et seq.

[3] See also Baldwin, *Report*, 1907, p. 44, and Thayer, *Official Report of the Fourteenth Universal Peace Congress*, p. 50.

Had the decision of the Hague tribunal in the Muscat case, which was a particularly good one under the present system of arbitration, been accompanied with as detailed an opinion as in the case of a German Imperial Court decision, it would have been less sharply criticized—Bressonnet [1] said: 'It is difficult to deny that it has been handled badly'—and would have contributed more to the development of international law.

In none of these cases, however, were there involved the most important juristic principles which could be presented to a court. Such questions were only passed upon by two later arbitrations before the Hague Court, namely, the Orinoco and the Savarkar cases.

In the Orinoco case the arbitral court had to determine whether the decision rendered by Barge in the dispute between Venezuela and the United States, and not accepted by the latter, should hold good or not. It had also to decide the celebrated question whether or not the decision of an international arbitration court is subject to revision. As a ground of nullity there was the express recognition by both parties in the *compromis* that there had been exercise of jurisdiction not granted and essential errors. Now the decision gave no clear information upon the point as to what was to be understood by an essential error, but confounded, as Scelle [2] has pointed out—and indeed intentionally—the terms 'exercise of power not granted' and 'essential error'. Indeed, I myself, in my commentary upon the Hague Convention for the pacific settlement of international disputes,[3] made the statement that the court was willing to admit essential error as a ground of nullity in a narrow sense. But I was only led to this

[1] *Revue générale*, 1906, p. 164.

[2] Ibid., 1911, p. 193.

[3] p. 148.

conclusion because I wished, at all events, to put some sense into what seemed to me an oracular decision. For I could not believe that the court, contrary to the terms of the *compromis*, was unwilling to accept essential error as a ground of revision.

Scelle very justly supposes that the court did not wish to declare either of the parties wholly in the wrong, and accordingly avoided taking a definite position upon the question of essential error. On the same ground it laid down the principle that if one part of an arbitral award should be held void, the other parts need not necessarily be held so. Neither of the parties had in their pleadings reckoned with such partial validity or invalidity, and yet the court decided in that manner. The decision is only intelligible if we keep before our eyes that the arbitral court desired to act to some extent as mediator. Only thus can it be understood why no definite position was taken in the decision upon the question of revision and why, in consequence of the obscurity resulting, Scelle interpreted the decision to be against the question of revision, while I in my commentary defended the decision as *in favour of* it.

If we take into account the fact that the court of arbitration has acted as mediator, we shall see that after all it rendered a good decision. But had the decision been rendered from a strictly legal point of view, it would have been much more useful for the development of international law, and Scelle as well as de Melville,[1] regrets that the arbitral court did not decide the question of revision as the principal one at issue. Neither of the parties would then have been rebuffed, for each reckoned with a rejection of the proposal as a whole, and the Ameri-

[1] *Eigen Haard*, Amsterdam, 1911, p. 96.

cans were greatly surprised to find that while they had won in principle, they only obtained the partial annulment of the decision of Barge, in consequence of the fact that the court had compromised. Scelle is quite right when he says that the arbitrators of the Orinoco case regarded themselves rather as 'friendly compositors' than as real judges, and that diplomatic arbitral courts are a danger to the development of international law. Naturally public opinion, as well in the United States as in Venezuela, recognized the element of compromise in the arbitral award, and expressed its displeasure with the decision.[1]

But if the Orinoco arbitral court, acting, as has been said, under the system of arbitral jurisdiction, rendered nevertheless a good decision, yet the same cannot be said of the decision of the Savarkar arbitration court which met some months later. The question at issue in this case was whether the Indian revolutionist, Savarkar, who had been brought back from French to British territory by the authorities, should be returned by England to France. The French and British cases, counter-cases and replies in this case take up well over three hundred pages. The counsel on both sides discussed the question at issue in the fullest detail. But the decision is accompanied by no legal opinion at all; it merely enumerates the facts. The legal issue was settled with the following words: 'There is no principle of international law according to which, under the circumstances of the present case, a fugitive criminal must be given back.' The decision met with general disapproval.[2]

[1] See in particular Dennis in *Columbia Law Review*, 1911, p. 500, and *El Universal*, Carácas, November 24, 1910.

[2] See Kohler, pt. i of the *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1911, pp. 202 et seq.; van Hamel, in the *Revue de droit international*, 1911, pp. 376 et seq.; Strupp, pt. i of the *Zeitschrift für Völkerrecht und Bundes-*

The decision simply passed lightly over the main point; as Kohler remarks, it did not decide it at all. It is, as van Hamel says, 'rather a verdict than a judicial decision.' By a peculiar irony of fate this decision, which exhibits a clear failure of the Hague Court, was rendered under the presidency of Beernaert, the same man who in 1907 pointed out with so much feeling that disputes would be settled by the Hague Court in a strictly legal way.

That the Casablanca decision sought to declare neither party wholly in the right nor wholly in the wrong may be stated as a generally recognized fact. This has been brought out in particular by Gidel [1] and by Dennis.[2] This fact may be readily approved in a dispute in which both parties were greatly wrought up.

The celebrated decision of the Newfoundland arbitration court of 1910 is also in the nature of a compromise. In particular was this clearly the case in the answer to the fifth of the seven questions before the arbitral court. In this instance the arbitral court had to determine upon the extension of territorial waters in the so-called 'bays'. The arbitral court decided that in such cases the three-mile belt should not follow the line of the Canadian coast, but a line stretching from one headland to another. That this decision finds no support in existing international law is recognized in particular by Balch,[3] Lansing,[4] de Louter,[5]

*staatsrecht*, 1911; Robin, in *Revue générale*, 1911, p. 350; Wehberg, in *Friedenswarte*, 1911, p. 120; and Dennis, in *Columbia Law Review*, 1911, p. 497, who is, however, mistaken.

[1] *Revue générale*, 1910, p. 407.

[2] *Columbia Law Review*, 1911, p. 498.

[3] *Revue de droit international*, 1911, p. 22.

[4] *American Journal*, 1911, p. 31.

[5] *Revue de droit international*, 1911, pp. 150 et seq.

and Dennis.[1] Balch [2] was the first to declare the decision a compromise. Soon after the honourable president of the arbitration court, Lammasch,[3] himself declared that the Newfoundland decision contained elements of a compromise.

Apart from the decisions of special arbitration courts there are no further decisions of the Hague Court. The composition of the special Russo-Turkish arbitration court, in which four or five judges were nationals of the parties, well expresses the spirit of the later tendency.

If we survey impartially what the Hague Court has done up to the present time, we must conclude, indeed, that it has settled numerous disputes, and has justified itself as a means of settling disputes. But, on the other hand, it must be pointed out that all of these decisions have done very little for the development of international law, and have denied and repudiated the most important principles. Robin feels compelled to declare in the *Revue générale* [4] that ' when we examine not only the decision of February 24, but certain others which preceded it, we are forced to admit that the Hague Court of Arbitration regards its functions as those of a mediator not less than as those of a judge '.

When Privy Councillor Fischer (Breslau), at the general convention of the Central European Economic Association at Munich on October 14, 1911, proposed the erection of a permanent international arbitration court for private claims against debtor states in connexion with the Hague Arbitration Court, Professor Harburger declared that he had some doubts upon the subject, because the Hague Arbitration Court did not decide in a legal way, but merely compromised. We have here the clearest recognition of the fact asserted above.

[1] *Columbia Law Review*, 1911, p. 498.
[2] Op. cit.
[3] *Das Recht*, 1911, p. 148.
[4] 1911, p. 351.

It is also evident, from what has been said, that in the above cases very valuable decisions might have been given, and thereby international law might have been developed. Von Plener [1] seems to me exceedingly bold when he makes the assertion that 'the great value which the creators of the new institution attach to a certain continuity of jurisprudence does not play so great a part in the case of arbitration, which has more often a character *sui generis* which requires special treatment in each individual instance.' That is unquestionably wrong. Von Plener has here in mind strictly political disputes only, which, in my opinion also, can still be settled in the future according to equity. That the legal questions are not always of an unique character is best proven by past cases. One need only examine how often the same questions have turned up in the 250 decisions thus far rendered. How often have similar questions of law arisen concerning claims for indemnity brought by foreigners injured in a war, concerning seizures of ships, fishing rights, the principle of prescription and of *res iudicata.* The argument of von Plener is, moreover, not a new one. At the seventeenth meeting of the International Law Association, in 1895, at Brussels, an Englishman, Mr. Webster, declared that the disputes arising in international life were of so diverse a character that there was no need of a permanent court; and that it would be much better to do justice to the individuality of each case by means of a court specially constituted on each occasion.[2]

We see, therefore, that in the prevailing system theory and practice are in complete opposition. Arbitral awards

[1] *Union*, 1911, p. 98.

[2] Report of the Seventeenth Conference held at Brussels, October, 1895, p. 39.

are so unanimously recognized as a compromise—as by Marburg and Wambaugh [1]—that the words of the Hague Convention which speaks of a decision 'on the basis of respect for law' must be regarded as a delusion. From this point of view Fischer,[2] in advocating the erection in connexion with the Hague Court of an international court of arbitration for claims against debtor states, emphasizes the fact that the connexion with the Hague Court should not lead to the mistaken opinion that the new court is to decide primarily according to equity, and not according to law.

When we realize in addition that international arbitration by its very nature calls for a decision according to equity,[3] we see immediately that it is a mistake to introduce into arbitration the judicial element of a strictly legal decision. In the exercise of their office international arbitrators cannot get rid of the thought that arbitration calls for a decision *ex aequo et bono*, and they are afraid that by a strictly judicial—that is to say, legal—settlement of the case, which declares one of the parties wholly in the wrong, they will give offence. Barbosa [4] is wrong when he says that arbitrators and judges are alike in that they both render decisions. In reality, only the judge decides while the arbitrator adjusts. Marburg [5] has justly remarked: 'The aim of a court of arbitration is to compose differences, and the spirit of compromise which prevails as a result thereof can hardly yield lasting principles of law or justice.' Dennis also points out [6] that the reason for the compromising character of arbitral awards is to be found in the very nature of arbitration and, accordingly, that the fundamental

[1] *Proceedings*, pp. xiv, 145.
[2] p. 15.
[3] See Hold v. Ferneck in *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1912, p. 14.
[4] p. 659.
[5] *Proceedings*, p. xiv.
[6] *Columbia Law Review*, 1911, p. 502.

remedy for the present condition of things is to be sought in the substitution of judicial settlement for arbitration.

Accordingly, it was a great mistake of the First Hague Conference to introduce into the field of international arbitration the demand for a strictly legal settlement, and such an attempt was necessarily destined to fail because of the incompatibility of international arbitration and judicial settlement. It was, indeed, permissible in 1899 to make a compromise between the two institutions by substituting certain characteristics of a legal decision for those of arbitration, and thereby creating a kind of transitional institution in the direction of a judicial court; but it was not permissible to substitute the most essential feature of a legal judgement, namely, a decision according to strict law, for the most characteristic feature of arbitration, namely, a decision according to equity. For the result was the establishment of an international judicial system in its essential nature; only there were lacking the external forms of such a system. If the intention in 1899 was to establish a real international judiciary, it should have been kept in mind that in so doing arbitration was being abandoned, and the necessary foundation of an international judiciary should have been laid. The whole mistake of the First Hague Conference arose from the fact that upon the most important principles the delegates were groping in the dark. Had the question been studied, another definition of arbitration would have been chosen. For the Conference desired in the last instance merely to develop the method of settling international disputes, not to establish an international judiciary. But in its noble zeal it thought that it could serve two masters, and the result was a mongrel institution which is neither wholly judicial settlement nor yet international arbitration.

What we need, accordingly, for the development of international law is real judges who are commissioned to decide in a strictly legal way and to avoid all awards in the nature of a compromise.

It follows, therefore, that the principle upon which Scott proposed the Judicial Arbitration Court to the Second Hague Conference was unique in character and very serviceable for the development of international law. It is Scott's chief service to have been the first to lay down clearly at a great gathering of states that we have on the one hand international arbitration for the equitable settlement of disputes which the parties regard as strictly political in character, and that on the other hand we have international judicial settlement for the strictly legal decision of disputes regarded by the parties as legal in character. Scott's views had already been expressed with the greatest clearness thirteen years earlier by the American, Hornby, in a report to the Universal Peace Congress at Antwerp. He showed that international judicial settlement must develop international law, and that this could only be done by a truly permanent court made up of professional and impartial judges, and that the existing system of arbitration was unsuited to that purpose. The same views were pointedly expressed by the president of the Peace Palace Endowment, Jonkheer van Karnebeek, on July 30, 1907, in his address at the laying of the corner-stone of the palace, when he declared that 'it is possible, it is perhaps desirable, to take a step from the system of arbitration towards the system of judicial settlement properly so called. That will depend upon the progress which the idea of international justice shall make in the minds of governments and of peoples.'

## 4. The Impossibility of Developing International Law Except by a Complete Reform of the Present System of Arbitration

But the loyal advocates of international arbitration are not satisfied with what has thus far been accomplished, and assert that if they reform the present system of international arbitration it will be quite possible to develop international law through that means.

In my opinion the failure of international arbitration in the past has been so fully proved that we can expect nothing from it in the future for the development of international law. International arbitration courts and, in particular, the Hague Arbitration Court, are composed not merely of jurists pure and simple, but in part of diplomats and, what is worse, also of nationals of the contending parties. Besides, it is certain that for the future decisions according to equity will be commended in the case of strictly political disputes. Under these circumstances, arbitrators will on every occasion be obliged to ask themselves whether a settlement of the dispute according to equity would not be better than a strictly legal decision. They will regard themselves as arbitrators even in cases where they should give a strictly legal decision. This will remain the case until a distinction is made between arbitration for the equitable settlement of disputes regarded by the parties as strictly political, and a judicial system for the legal settlement of disputes regarded by the parties as legal in character.

De Louter [1] in particular emphasizes the fact that the Hague Arbitration Court can give no guarantee for strictly legal decisions.

[1] *De Gids*, 1912, no. 2

Dennis[1] also is of the opinion that the strictly legal decision of disputes can be attained only through the 'fundamental and ultimate remedy', namely, the establishment of an international judiciary. Nevertheless, he recommends various means to facilitate as far as possible the strictly legal settlement of international disputes until the time comes when we shall have a permanent international court of justice. Accordingly, he proposes five distinct improvements in the present system of arbitration:

1. A legal decision must be provided for in the arbitral agreement and a compromise distinctly forbidden. Dennis compares the Casablanca case with the arbitral agreement in the San Juan boundary arbitration of 1869. In the first of these cases the terms of the arbitral agreement were apparently general in character, so that the intention of the parties that a compromise, rather than a judicial decision, should be reached, was well understood. In the second case the British commissioner had proposed that the dispute should be disposed of by a sort of compromise; but the American commissioners were opposed to this and demanded a legal settlement, and were annoyed at the fact that the arbitral agreement contained a contrary instruction. The decision rendered by the German Kaiser was also in accord with this stipulation. It may be that when there is an express instruction in the arbitral agreement to that effect, the arbitrators will feel compelled to render a strictly legal decision of the dispute. But whenever this is not the case a relapse is to be feared. The arbitrators will not be able to get rid of the idea that they are arbitrators and not real judges.

It is certain, however, that states will rarely include such a provision in their arbitral agreements. In the

[1] *Columbia Law Review*, 1911, pp. 502 et seq.

numerous cases in which the right clearly lies more on one side than the other, such an agreement will not be reached. For in such cases it will be the very party that believes that it will lose its case which will give with difficulty its assent to such terms. For it naturally hopes to obtain a more desirable decision by a compromise.

Hence this remedy is entirely inadequate in character.

2. The body of judges should, as Dennis further proposes, be selected by common agreement of the parties, as has already at times been done. Henceforth neither of the parties are to appoint their judges, whether one or two, independently. For in such case they are generally more or less influenced in favour of the state which has appointed them.

But not even in this way can a compromise be prevented. The history of numerous cases of arbitration during the last century shows how difficult it is for the parties to agree upon several judges. In the only two recent cases in which this has happened, the Savarkar and Newfoundland cases, the decision was clearly a compromise.

3. A detailed 'Code of International Procedure' should be drawn up. In particular a more precise distinction should be made between the case and the counter-case.[1] Moreover, the argument must be regulated.[2] This change would certainly be very useful. But I doubt whether it would help to do away with the element of compromise in arbitral awards.

4. Less value is to be attached to the point of unanimity in the decisions rendered. For unanimity, as a rule, results from the fact that the judges agree upon a compromise.

[1] See *American Journal*, 1911, pp. 55 et seq.

[2] See my commentary upon the Hague Convention for the pacific settlement of international disputes, pp. 110 et seq.

This was particularly the case in the Venezuelan dispute, in which the president, in announcing the decision of the court, called particular attention to the fact that the decision was a unanimous one. Dennis thinks that Drago's dissenting opinion in the Newfoundland decision is a very hopeful incident in the direction of more correct views. He says that the provision in the earlier Convention of 1899, that each judge must sign the decision, should not have been eliminated in 1907.

On this point I cannot entirely agree with Dennis; I mean, I think his praise of Drago is scarcely justifiable.[1] Dennis undoubtedly errs in supposing that compromise has been introduced because it was desired to make the decision unanimous. In the Muscat case the fact of unanimity in the decision was not expressly announced, so that in later cases in which the decision was not unanimous this fact need not have been specially pointed out. According to the provisions of Article 79 of the recent Hague Convention, the decision is signed only by the president, and a dissenting opinion may no longer be separately placed on record. Precisely for that reason it has resulted that henceforth there is no longer any outward indication whether a decision is unanimous or not. I am entirely in accord with the present rule and consider a change unnecessary. Moreover, decisions as important as those in the *Alabama*, Bering Sea, and Newfoundland cases, which were undoubtedly compromises, were not unanimous, but were reached by a majority of votes.

5. In conclusion Dennis proposes that the parties shall have the right to a revision and to an annulment of the decision. On this point I am, as I shall point out again later on, in agreement with Dennis. But how can the

[1] See my commentary, p. 139.

whole system of arbitration be improved thereby? If the court of first instance renders a compromise instead of a strictly legal decision, we may well suppose that the same principles will be applied in the decision on appeal. If a strictly legal decision can possibly be given, it should be given by the court of first instance.

But even if the arbitral judges of the Hague Court could, by means of positive instructions, be induced to render strictly legal decisions with a detailed judicial opinion, nevertheless that would be no guarantee for the development of international law. Just as the decision of a dispute according to equity entirely excludes a development of international law, so the legal settlement alone of international disputes offers little guarantee of the development of international law, unless in addition the further conditions be fulfilled:

1. The individual decisions must be consistent with one another.
2. The strictly legal settlement of disputes as a body must be made possible. For if individual cases only are decided in a legal manner, the decisions will not be numerous enough to secure the development of international law.

So long as international courts meet without any dependence one upon the other, it is impossible to build up judicial traditions and precedents. An arbitral court does not consider itself bound by the decisions of previous tribunals.

The present system gives us decisions which are not connected with one another and often contradictory. Mallarmé[1] has already pointed this out: 'The manner in which the Hague Court is constituted makes it impossible

[1] *Revue générale*, 1906, p. 500.

for a system of jurisprudence to be formed.' [1] Among many others the American delegate, Mr. Choate,[2] expressed the same view at the Second Hague Conference: 'The absence of continuity in the Permanent Court has greatly lessened its power and its influence. Each of its meetings has been without any connexion with the others, and its decrees, rendered at different intervals and upon diverse subjects, have done little to promote the progress of the science of international law; nor have they built up a system of international jurisprudence which we may rightly expect from a tribunal resting upon the consent of all nations.' [3]

All of these facts will be fully discussed later when we treat of the character of an international court of justice. Here we can only show that under the present system of international arbitration, and in particular under its culmination—the Permanent Court of Arbitration—the legal settlement of disputes as a body is impossible.

For if we look more closely at the Hague Permanent Court of Arbitration we see that in spite of the terms of Article 42 of the Convention: 'The Permanent Court of Arbitration is competent for all arbitration cases,' it has been created only for the settlement of such disputes as are either political in character or of important economic significance.

In addition to the Administrative Council and International Bureau, the Hague Permanent Court of Arbitration consists of a list of judges. Each state selects at most four judges who are inscribed upon this list. If then two parties desire to refer a dispute to the Hague Court, they choose from this list the judges who are to act in the

[1] Of the same opinion is Duplessix (*Official Report of the Seventeenth Universal Peace Congress*, 1909, p. 419).

[2] pp. 311, 594.

[3] Of the same opinion is Leger (p. 338).

individual case. The two parties must themselves pay the honoraria of these judges. Now a number of international disputes arise in which a difficult legal problem may indeed be at issue, but in which the object involved is of trifling importance. Now if a dispute of this kind has no political bearing, it does not pay to call together for its settlement a number of international jurists who demand for pay a thousand marks as an honorarium. For such smaller cases we must have a much cheaper way of settling the affair upon a legal basis. For even the summary procedure provided for in the Hague Convention is not adequate, as von Plener [1] mistakenly thinks. This procedure also demands the calling together of a special tribunal, and is still too expensive for the smaller disputes. Accordingly, a cheaper procedure would be of importance for the development of international law and for the peace of nations. For it is clear that the same dispute, which arises over an object not essentially of a political character and of no great material consequence, may later appear in the form of a difficult political question. Supposing that the unimportant question had first been settled in a strictly legal way, it would be clear in the second case what each of the parties could rightly claim. There would then be more secure foundations upon which to proceed to the settlement of a dispute which might perhaps endanger the peace.

It is quite unintelligible how, in the face of this well-known fact, the over-zealous friends of the Hague Court of Arbitration are able to assert that it is well suited to the development of international law. No, the contrary is the case. Of the endless number of international disputes a decreasingly small number will be settled by means of

[1] *Union*, 1910, p. 98.

arbitration, because the cost of this method of settling disputes is ridiculously high in comparison with the trifling objects at issue. As early as 1904 Renault[1] declared: 'The working of the Hague Court is not without certain complications, and it must also be said, not without a certain expense; the object at issue should be worth the trouble. In many cases an arbitration could be carried out much more simply.' Is it any wonder that in the last one hundred and twenty-five years not three hundred international arbitral decisions have been rendered, whereas the supreme court of every nation renders considerably more decisions in a single year? Does one really believe that the small number of international cases offered for settlement is merely due to the dislike of the powers for international arbitration, or to the simple fact that there have been so few cases offered? In all the disputes which thus far have been submitted to arbitration, there has always been involved either an important political question or a question involving valuable material interests. In the arbitral decisions involving questions of money, millions have always been at issue, and the few exceptions in which trifling objects were in dispute took place forty and more years back. The disputes before the Hague Court, in so far as a money value can be assigned to the object at issue, have always involved large sums. The Mexican-American dispute involved 10½ million marks, the Venezuelan dispute 80 million marks, the Newfoundland case 104 million marks, the Orinoco case 6 million marks, the Italian-Peruvian dispute one million marks, and the Russo-Turkish dispute over 25 million marks. Of the disputes settled by special arbitration courts in recent times there are two which relate merely to money claims. In the dispute between Brazil and

[1] *Recueil des arbitrages*, p. ix.

Peru 55 million marks were involved, and in the Alsop dispute between the United States and Chile 4 million marks.

Disputes involving such large sums naturally do not arise every day, and it is precisely the questions of serious import which states are unfortunately still very reluctant to submit to international arbitration. But when arbitral decisions are so infrequent, how can there be any development of international law ? Is it not urgent that smaller disputes also, in so far as they involve questions of interest, should be settled by means of an international process ? For that purpose is there not need of an entirely different international organ from that of the Hague Arbitration Court, which is indeed not too expensive for disputes of a political character, the friendly settlement of which saves nations from the demon of war, but which in the case of strictly legal disputes, where the object at issue is not important, is exceedingly costly, and, therefore, not available ?

Accordingly, Houzeau de Lehaie rightly declared at the Twelfth Universal Peace Congress at The Hague[1] that the cost of the Hague Arbitration Court was very heavy, and that some relief should be afforded in this connexion. He proposed, therefore, the establishment of an international fund to defray the costs of arbitration ; this fund was to be obtained first of all from voluntary contributions. The congress passed a resolution to that effect.

A single example from my experience will show that governments, as was moreover demonstrated at the Hague Conference of 1907 (only not pointedly enough), regard the Hague Permanent Court of Arbitration as entirely unsuited for the smaller disputes. In the year 1910 the Commercial Treaty Union approached the German Foreign Office with the request that it submit to the Hague Court

[1] *Official Report*, p. 130.

a legal dispute of great significance. But as only a few thousand marks were involved, the German Government refused to take up the case. Yet a decision by an international tribunal of the highly significant questions raised in this case would have been of the greatest value for the development of international law. It may be worth while if I reproduce here what the Commercial Treaty Union wrote me, on December 16, 1910, relative to its communications with the Foreign Office:

> In addition, you will perhaps be interested to know that we brought before the Law Department of the Foreign Office here the possibility of submitting questions of this kind at present to the Hague Court of Arbitration. But we were told that under the present circumstances this was in principle only possible in cases involving a public quasi-political question, and that, moreover, the enormous cost made this method of settlement seem in advance impracticable in all cases involving only a few thousand marks.

Of the many official declarations in this connexion, the following are selected. Of the five arbitral agreements which were entered into in September, 1905, between Sweden and Norway, only one provided that jurisdiction should be given to the Hague Court of Arbitration. In explanation of this, Löwland declared in the Storthing on October 8, 1905, that the Hague Court had been abandoned because a decision could be obtained more quickly and more cheaply with other arbitrators. Further, the German Secretary of Foreign Affairs, Baron von Schoen, as a member of the Budget Commission of the German Reichstag, declared on January 26, 1909, that he was greatly in sympathy with the practice of arbitration, but that there were cases in which the heavy costs were out of all proportion to the importance of the object at issue. And the Prussian

Minister of Commerce declared in a decree of September, 1911, that 'in view of the peculiar character of arbitral procedure as an exceptional measure, and in view of the expenses connected with it, only those disputes will be submitted to arbitral decisions which involve large sums of money or questions which are of fundamental or great economic significance'. Needless to say that by questions of fundamental significance only the most important questions of principle are to be understood.

Owing to the absence of a permanent court of arbitration, the arbitral clause contained in the numerous (nine) recent treaties of arbitration concluded by Germany is almost of no practical value. The cost of a special arbitration court is so great that although the arbitral clause has been included, for the most part, in treaties for the past six or seven years, thus far only one arbitral court has been constituted.[1]

We need not wonder at the fact that the Hague Court of Arbitration and the special arbitration courts settle only the more important disputes, namely, those of a political nature, and especially those the decision of which can contribute least to the development of international law. For the Hague Court of Arbitration and all special arbitral courts are a part of the system of international arbitration, which in its essential character demands an equitable settlement of disputes which cannot be peacefully settled by the parties and which endanger the peace of nations. Such disputes arise principally from grave political sources. Arbitration merely seeks to dispose of disputes. It has little concern to decide the law between the parties. That, and that alone, is the aim of an international judicial system.

[1] See Borgius, p. 5, no. 23 of the *Mitteilungen des Handelsvertragsvereins*, 1911.

## CHAPTER IV

### THE IDEAL OF AN INTERNATIONAL COURT OF JUSTICE

#### 1. The Exclusion of Diplomats

If then the purely legal settlement of international disputes is desirable in the interest of developing international law, the question arises how this international judicial system must be constituted.

The chief element of a judicial system is that the court of justice shall be composed of jurists and not of diplomats. Accordingly Vavasseur [1] is entirely wrong in proposing that the new court of justice shall be composed: (1) Of sovereigns; (2) of the ambassadors accredited to The Hague; and (3) of the Dutch Minister for Foreign Affairs. The Fifteenth Universal Peace Congress, in session at Milan in 1906, unfortunately supported this proposal with certain changes. Diplomats are far too closely connected with the individual groups of powers to be able to guarantee an impartial decision. The settlement of disputes by diplomats can, moreover, at the present time contribute nothing to the progress of international law, as Mougins de Roquefort [2] has already shown. In principle only jurists can render a judicial decision. This has been pointed out in particular by Salisbury in his telegram [3] of March 5, 1896, to Pauncefote, and by Root [4] and Scott.[5] There is no objection to the

[1] *L'Organisation d'une juridiction arbitrale internationale*, p. 23.

[2] pp. 77 et seq.

[3] To be found on pp. 21 et seq. of the third part of the excellent collection, *Actes et documents relatifs au programme de la Conférence de la paix* (Hague, 1899), by Jonkheer van Daehne van Varick.

[4] *The Importance of Judicial Settlement*, p. 10. [5] p. 315.

appointment of diplomats upon international arbitration tribunals. On the other hand, it would be wrong to maintain that mere jurists are not competent to decide practical cases, which have, to a small extent at most, a political character. There is a great number of distinguished jurists who possess a very keen and practical judgment. I need only name men such as Asser, Fromageot, Lammasch, Renault, Scott, and Zorn. It may also be pointed out that the proposals made thus far by the Institute of International Law, which is a body composed only of international jurists, have been based on very practical foundations. A confidence in the ability of such jurists, who possess a practical point of view, has already induced certain persons to propose a tribunal composed strictly of jurists. In consequence various projects have been offered for the establishment of a sort of international academy for the decision of international disputes. I refer in particular to the proposal made by Kaufmann, a university professor at Bonn, in a publication which appeared in 1855, entitled *The Idea and the Practical Uses of a World Academy of International Law.* In 1890 Saint-Georges d'Armstrong [1] proposed a mixed board of diplomats and jurists. Eight years later, in an article in the *Nation* [2] von Bar advanced this same idea, but rightly limited the members of the academy to jurists only; and scholars such as Brusa, Bajer, and von Ullmann are in accord with him. These plans were, to be sure, not practicable, for an international judicial system can only be established by means of an independent tribunal, not by means of a board whose views would first have to be laid before the nations for their approval, as is the case to-day with the reports of

[1] pp. cxv et seq.

[2] October 15, 1898; see also his article in the *Courrier européen* of April 21, 1905.

commissions of inquiry. It was accordingly a happy thought of Nippold's to develop out of the plan for a world academy for legal opinions the idea of an academy of international law, which is to be opened at The Hague in the summer of 1913.[1]

In his address delivered before the First National Peace Congress at New York, in 1907, Root[2] rightly said: 'What we need for the further development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility.'

## 2. The Exclusion of Nationals of the Contending Parties

The principle that no one can be a judge in his own case must be strictly applied not only in national but also in international law as well. If the nations really desire to develop international law through the decisions of international judges, they must offer some guarantee that the judges in a given case will not in any way sympathize with either of the parties. The authority of the highest court of the world must suffer if in its very composition a fundamental principle of law is violated. At the present day a national cannot easily be impartial towards his own country; he will always feel sympathy for its case. Accordingly the United States and Great Britain at the Second Hague Peace Conference rightly desired to see national judges excluded, in order to offer to states the most complete guarantee of the impartiality of the court of justice. It was only

[1] See in this connexion the *Friedenswarte*, 1911, p. 50, and the literature cited there; also the first Year Book of the Carnegie Endowment for International Peace, 1911, pp. 109 et seq. Owing to the European War, the Hague Academy has not as yet been opened.—Translator.

[2] p. 45.

because of the opposition of Baron Marschall,[1] with whom Karandjouloff[2] among others was in accord, that those countries yielded on this question. Within the last few years Tripp,[3] Baldwin,[4] McKenney,[5] Wambaugh,[6] and Ralston[7] have in particular demanded the exclusion of national judges. No better argument for this demand can be found than the fact that the overwhelming majority of writers would like to see nationals excluded even from the so-called 'arbitration courts'.[8]

The presence of two national judges upon a great board of judges of from nine to fifteen persons can to be sure not do much harm. For this reason if the number of judges in the new court of justice should be great, the contending states might well be allowed a national judge upon the tribunal, in order to preserve the principle of the Permanent Court. But in that case the ideal of an international judicial system would not be attained. Moreover, I disapprove of the appointment of a tribunal of from nine to fifteen persons, because in that case the responsibility of the individual members would be too light. I would prefer a court of justice composed of five or seven members. A tribunal of smaller composition has been advocated by von Bar,[9] who proposed five judges, and Lammasch,[10] who proposed seven judges. Barbosa[11] also insisted, in 1907, that in a tribunal composed of too large a number of members, the majority might be too easily made up of few real jurists.

[1] p. 603. [2] p. 345. [3] *Report*, 1907, p. 47.
[4] *The New Era of International Courts*, p. 1.
[5] *Proceedings*, p. 97. [6] Op. cit., p. 145.
[7] Op. cit., pp. 154 et seq.
[8] See my commentary upon the Convention for the pacific settlement of international disputes, pp. 75 et seq.
[9] *Berliner Tageblatt*, August 22, 1907.
[10] *Das Recht*, p. 151. [11] p. 620.

But it is self-evident that in the composition of every tribunal there must be as many men as possible who are well versed in the legal systems in force in the countries of the contending parties. In this way the other judges will receive valuable enlightenment from the deliberations, and the arguments of the agents and counsel will be supplemented. Thus, a Swiss national could very well enlighten his colleagues concerning Germany's legal system, and an American judge in like manner concerning the English legal system, and a Spanish judge concerning the South American legal system. But too great value must not be placed upon the presence of judges who are versed in the prevailing legal systems, because the principal point will always be the fact that the judges shall, during the course of a trial, make themselves perfectly acquainted with the legal systems, in the first place through the arguments of the agents and counsel, and then through the statutes and appropriate books. The decision will, however, always be rendered by the whole body of judges, and accordingly the best security against wrong decisions will always be the fact that the judges as a body have become perfectly acquainted with the given legal systems, and not the fact of the presence on the tribunal of a number of persons who are well versed in the particular legal system in question and can protect their colleagues from serious errors. It needs no proof that the counsel on both sides will throw sufficient light upon the point at issue, and thereby assist the tribunal to an understanding of the case just as much as would be possible if there were specialists upon the tribunal. The judges can, however, by means of the right of interrogation, have any obscurity cleared up by the attorneys.

If the presence of experts in the respective legal systems were to be too strongly emphasized, it would lead finally

to the demand that only representatives of the legal systems, or distinguished specialists in this particular field, could be appointed to the tribunal. But that would be a mistake, because it must be the task of the international judiciary to reconcile national characteristics with international principles. Scott[1] aptly remarks: 'Domestic law should be internationalized, if it is to attain the object of permanent arbitration.' But that can only be done by persons whose attitude towards the respective legal systems is an objective one, not by those who are bound up with them, and who accordingly are easily tempted to introduce into international law the peculiarities of their legal system.

Moreover, the necessity of having representatives of the individual legal systems present upon the international tribunal is greatly over-estimated. It should be remembered that international private law disputes would not be heard by the international court of justice, because they would be turned over to a special court, as has been repeatedly proposed in recent times.[2] It is clear that, so far as possible, disputes involving questions of international public law must be sharply distinguished from those involving questions of international private law, as Kamarovski has already advocated. For these two branches of legal science have come to be so comprehensive that the number of those who are well versed in both of them is becoming constantly smaller. In the case of disputes in the domain of strict international law experts in the respective legal systems are not so often met with as in international private law. It would seem that at the Second Hague

[1] p. 319.

[2] See my article *Ein internationaler Gerichtshof für Privatklagen* in the commercial-political pamphlets of the Commercial Treaty Union, 1911 also Daehne van Varick, *Le Droit financier international*, Hague, 1907.

Peace Conference such great importance was attached to the representation of distinct legal systems merely because persons were possessed with the idea that international private law disputes were also to be assigned to the new court of justice.

What I have thus far said is based upon the assumption that an international court of justice for the claims of private persons is not to be erected simultaneously with one for the settlement of disputes between states.

But in case both projects were to be realized simultaneously, it would not be necessary to establish several courts, but merely several divisions of one and the same court, provided, however, that the division for international disputes be organized according to the principles set forth above. On the subject of the close connexion of the two projects, I refer to the excellent remarks of Schücking.[1]

### 3. The Exclusion of Judges appointed by the Parties

But we must go still farther and assert that in general judges appointed by the parties, even when they are not nationals of the state appointing them, offer no guarantee of an impartial decision. Barbosa [2] declared, in 1907, that the judges of the new court of justice would after all be only men and would not renounce their nationality in accepting their new office. Indeed, Ordoñez [3] even thinks that it is quite impossible to constitute an international court of justice, whose members as a body would possess the necessary impartiality, not merely in one, but in all cases. One need only consider how few states there are, and upon what numerous grounds of race, of geographical

[1] Op. cit., pp. 158 et seq. [2] p. 344. [3] p. 156.

situation, and of interests they stand in relations of friendship with or opposition to one another. This is all the more reason why, in my opinion, every precaution must be taken in order to obtain judges as impartial as possible. It is, however, evident that the individual states will only too readily name persons who will represent the views of the state appointing them, and will accordingly neglect the interests of the whole body. No reproach is to be cast upon states for so doing.

On the other hand, the judges who have been appointed by one party will be reluctant to vote against the state which has chosen them. For in choosing them the state places a certain trust in them, that they will represent its interests as far as possible. Thus Cockburn in the *Alabama* case and Drago in the Newfoundland case were unable to vote against the country by whose government they had been appointed. In earlier cases it had been taken in bad part when judges did not vote in favour of the government by whom they were appointed.

It frequently happens that international judges have already expressed their views upon a given question in their writings, so that states have in many disputes the opportunity of informing themselves of the views of the judges whom they appoint.

McKenney, the American counsel in the Orinoco case,[1] rightly observes that ' the non-nationals, arbitrarily selected by one or the other of the disputants, readily take on the colour, the attitude of mind of the disputant to whom they owe their selection '. McKenney thinks that this difficulty could be removed if each party presented to the other party a list from which the latter should select the judges, so that the choice of either side would be limited

[1] *Proceedings*, p. 97.

to persons who would be acceptable also to the other side. Prescinding entirely from the fact that this procedure would be much too troublesome, the result in this case would be that the judges presented by state *A* to state *B*, and selected by state *B*, would only too readily look upon themselves as representatives of state *A*, which first placed confidence in them, whereas state *B*, as it were, only appointed them under compulsion. It is impossible to obtain an impartial tribunal so long as the parties themselves appoint the judges.

Moreover, since the international court has for its object not only the settlement of individual disputes, but also the development of international law, it is necessarily the agent of the family of nations, and not merely the agent of the parties who make use of it in a particular case. Schlief [1] rightly observes: 'Every judicial decision which results from the arbitration of a case must be not only a mere settlement of the case which prevents war between the parties . . . but must of necessity represent the demands of higher interests of mankind.' Accordingly, the international community has by right a voice in the selection of judges, and may demand that impartial judges be appointed, so that international law may be developed through their legal decisions. The disputants must, accordingly, be forbidden to constitute the court themselves with a view to the particular dispute.

Moreover, the court will often have to interpret world treaties. In such cases especially, not only the parties but the entire body of the states signatory to the particular treaty are interested in an impartial decision, so that the parties should not be given an independent voice in the selection of judges.

[1] *Der Friede in Europa*, pp. 274 et seq.

If we examine now the reasons which are alleged for the appointment of the tribunal by the parties in the individual case, we shall find that they are unsound. It is said in general that the judges would possess in a higher degree the confidence of the parties if they were appointed by them. But that could only be the case if the judges as a body were appointed by both parties together, as was advocated in the plan of the first Pan American Congress, and in that of the International Law Association at its meeting at Brussels in 1895. But, in fact, such an agreement can only very rarely be reached, as is pointed out on p. 67 of the report of the International Law Association. For this reason Article 45 of the Hague Convention for the pacific settlement of international disputes, which was based upon a project of the Institute of International Law, provides a method for the composition of the arbitral court by which each party first appoints one or two arbitrators, who then together choose an umpire. In by far the larger majority of cases the arbitral court is composed in this manner, and of the twelve disputes thus far submitted to the Hague Court only two can be named in which the disputants have together agreed upon a number of arbitrators. This was the case in the Newfoundland dispute between Great Britain and the United States, and in the Savarkar dispute between Great Britain and France. In all other cases the tribunal did not possess the confidence of both parties. If, when there are three judges, judge *X* has been appointed by state *A*, and judge *Y* by state *B*, it is clear that judge *X* only possesses the special confidence of state *A*, not that of state *B*, and that judge *Y* only possesses the special confidence of state *B*, not that of state *A*. Hence, it is incorrect to say that the body of judges possesses the confidence of both states, since this

can at most be the case with respect to the umpire. But the choice of the umpire is in almost all cases left to the judges appointed directly by the states. In the Casablanca case the arbitrators appointed by France certainly did not possess the special confidence of Germany; rather Germany was obliged to assume that the arbitrator appointed by France would vote for France. It may be assumed without further ado, that in a dispute between states *A* and *B*, the arbitrator appointed by state *A* will have the confidence of state *B* in a far lesser degree than a judge appointed by an entirely neutral power. The difficulty of appointing judges who are satisfactory to both parties is emphasized also in the programme of the American Society for the Judicial Settlement of International Disputes. If it is certain that recent theory and practice favour a method by which the majority of the arbitrators possess only the confidence of one of the parties, it is unintelligible how the contrary assertion can be made that the free choice of the judges by the parties can alone secure the composition of a tribunal whose members as a body possess the confidence of both parties. Barbosa [1] said in 1907 that a French judge was a guarantor for France, if France herself had appointed him. But he forgot to add that in that case the opposite party would also have a guarantor upon the arbitral tribunal, and that the two guarantors would thus offset each other, and the decision would rest with the umpire who possessed the confidence of the parties in a lesser degree than a judge appointed directly by them. When men such as Barbosa,[2] Baty,[3] Beernaert,[4] Carlin,[5] Bustamante,[6] Guillaume,[7] Lammasch,[8] de Louter,[9] and

[1] p. 696. [2] pp. 340, 659, 696. [3] *International Law*, p. 5 et seq.
[4] pp. 333, 334. [5] p. 145. [6] *La Seconde Conférence*, p. 203.
[7] p. 160. [8] p. 653. [9] Vol. ii, p. 159.

von Plener[1] assert that international arbitration presupposes the free choice of the judges, it is undoubtedly true. What we desire, and what Scott sought to obtain in 1907, is not at all international arbitration, but international judicial settlement. While in international arbitration, as a rule, only a part of the judges enjoy the confidence of one party, in international judicial settlement, as we shall see later, the composition of the court is such as to secure the interests of both sides in the highest degree. Root in particular has expressed that idea in his article 'The Importance of Judicial Settlement'.[2]

The ideal of an international judiciary can only be a court of justice whose members are not directly appointed by the parties.

### 4. The Exclusion of Judges appointed for Particular Disputes—Permanence of the Court

It is further to be observed, as Hornby pointed out as early as 1894, that international judicial settlement requires judges who are such by profession, and whose tenure of office is for life. Only judges by profession can give such clear and correct decisions as the parties to an international dispute have a right to expect. It is the prevailing opinion at the present day[3] that the duties of a judge are not merely abstract in character, depending for their fulfilment upon a knowledge of the law, but that a satisfactory decision can only be given by judges who are thoroughly conversant with the affairs upon which they are to pass judgment. Such knowledge Kaufmann insists can only be

[1] *Union*, 1908, p. 46; 1910, p. 98. [2] p. 7.

[3] See in particular Danz, *Auslegung der Rechtsgeschäfte*, 3rd ed., 1911, p. 77, and Kaufmann, *Wesen des Völkerrechts*, p. 5.

had through constant practice based upon settled tradition. What a difference there is between a judge appointed for a given case, who has to decide in a special instance upon legal relations with which he has never before in his life come in touch, and a judge by profession, who has studied the foundations of international life during years of activity as an international judge!

It is only upon the hypothesis that the court shall be composed of judges who are such by profession, that an international court can be erected whose members do not at the same time occupy high offices of state in their own countries. 'The fact that an international judge holds a high office in his own country,' says d'Estournelles,[1] 'creates a suspicion of partiality.' For the same reason Bustamante[1] advocates members appointed for life, who hold no national office.

This principle is so decisive that the contrary proposal made by Wheeler at the Lake Mohonk Conference of 1910[2] cannot be seriously considered. Wheeler thinks that it would not be well for the judges of the new court to devote themselves exclusively to the affairs of the Hague Court; that in the beginning there would perhaps not be much to do, and that if the judges were at the same time to sit in national courts they could gain greater experience. In other countries as well as in Great Britain and the United States, the judges are not always exclusively occupied upon a single court. But to say this is to forget that national judges, however varied their activities at a given moment, are exclusively occupied with the courts of one and the same country. Wheeler wishes the judges to be occupied at the same time with the affairs of national and international courts. In this way their impartiality would be

[1] p. 195. [2] p. 91.

seriously affected. The case would be quite different if Wheeler had merely proposed that the judges should be engaged upon various international courts. If, as international law develops, a greater number of these courts were to be established, there would be no objection to carrying out the proposal in that form.

The commission appointed by the Interparliamentary Union in 1894 also arrived at the conviction that the judges should not be forbidden to hold another office; that there was with men a time of life when they would only give up their former profession with reluctance; that in the case of members of the international arbitration court it would be a question for the most part of persons who had won special merit in their former profession; and that in consequence they could not be abruptly torn away from their old pursuits. There is indeed some truth in these assertions. But a man who does not feel that he has such a vocation for the office of international judge, that he will devote for the future his whole life and energy to this new office, is simply not suited to be a judge of the community of states.

But is it not necessary on this supposition to adopt Beernaert's fears [1] that enough judges would not be found for the new court of justice? It seems to me that this question cannot be seriously entertained. Those who put it have no correct conception of the idealism which animates so many men in this world to undertake the great tasks of international law. As there are at the present day jurists constantly seeking a position upon the International Bureau of the Hague Arbitration Court, though no consideration is paid to their request, so in the case of the new court of justice the number of able men will be greater than the need.

[1] p. 333.

Professional judges, whose duty it must be to reside permanently at The Hague, are only possible in the case of a truly permanent court. Now such a court is necessary not only for the sake of the impartiality of the judges, but above all because only a permanent court of justice can guarantee the development of international law. This has been strikingly pointed out in particular by Hale in a paper read before the Fifth Universal Peace Congress at Chicago, in 1893,[1] by Schücking,[2] and by Wambaugh, professor at Harvard University.[3] If a court decides a legal question, and if after a certain time a similar case is presented to the same court, the court will feel called upon by reason of its traditions to decide according to the earlier precedent, unless errors shall have been discovered in the first decision. But if the two disputes should be decided by two distinct courts, each being set up for a single dispute, the second arbitration court, being composed of entirely new members and not connected by any tradition with the first court, would not attribute any authoritative weight to the earlier arbitral award and would readily decide the case in another way. The same thing would happen in every case, and varying decisions would constantly be given. If the judges have familiarized themselves with a difficult question, and if a similar question comes later before the same court, this permanent court, by reason of the experience it has obtained, will be in a much better position to decide the new case than a tribunal composed of other persons and not connected with the past by traditions. For the fact is that the decisions thus far rendered, as has already been pointed out, have not developed international law because none of them possessed the tradition and the authority of the decisions of a world court. Thus far every

[1] *Report*, p. 167. [2] Op. cit., p. 91. [3] *Proceedings*, pp. 140 et seq.

question has been treated from an individual point of view, and no great general principles have been developed. The decisions of international courts of arbitration up to the present time cannot at all be classified according to principles of law.[1] Foulke[2] very aptly remarks: 'The umpire in an arbitration need not decide any case in accordance with the decisions of previous tribunals. He can decide according to his own sweet will. But if a court is established, the precedents of that court go to the making of law, and pretty soon you will find out what that law is.' That this is the case is also conceded by Nys[3] and by Renault.[4] The latter asserts: 'What one [court] has decided has no binding force upon the other, a situation which is not without its objections.' When, then, Renault further says that, on the other hand, the fact that the decisions are rendered without any connexion with one another has also its advantages, he falls into a striking error. He thinks that if the same dispute should arise later between two other states, one of them need not fear in advance that it will lose its case, should the court render the same decision. On the contrary, it is to be observed that if there is a permanent court of justice, states will, in a case such as the above, generally dispense with a trial, because the first case has already been decided according to strictly legal principles, and it is foreseen that a new decision of the court will be to the same effect. Which is to be preferred, that the parties settle their disputes outside of court, because they have a standard by which to test their rights in the case, or that they should once more turn over the question to a court?

[1] See p. 29. [2] *Proceedings*, p. 288.
[3] *Revue de Droit intern.*, 1906, p. 18.
[4] *Recueil des arbitrages*, by Lapradelle and Politis, p. vii.

Wambaugh [1] rightly points out that he searched in vain in all the commentaries upon international treaties for any instance of an interpretation based upon the decision of an international arbitration court. In his well-known essay [2] Descamps has already called attention to the great advantages of a permanent court of justice, which in each particular case would be subject to the influence of a responsibility both towards the past and towards the future.

Years ago Rössler,[3] in advocating a state court, expressed himself in words which are applicable to a court of nations: 'The beneficial result to be expected from a state court is the development of a fixed and uniform tradition, resting upon broad principles, for the settlement of cases of conflict in public law. How can such a tradition arise from temporary courts?'

## 5. The Question of the Erection and Composition of the Permanent Court

At the Second Hague Peace Conference very heated discussions took place upon the question whether every state should have an equal voice in the appointment of the judges. The American draft of the Court of Arbitral Justice had in view a court consisting of fifteen members.[4] It was clear from the start that if the judges were to be appointed directly by the states, an equal right of appointment could not be conceded to every state. The next

[1] Op. cit. [2] p. 51.

[3] *Studien zur Fortentwicklung der preussischen Verfassung*, pt. 2, 1864, pp. 87–8.

[4] The original form of the American proposition is not printed in the acts of the Conference, and is to be found only in the work, *American Addresses at the Second Hague Peace Conference*, pp. 206 et seq.

proposal sought to form a system of electoral circuits in which individual countries were grouped together, and then as a group were to appoint a judge, while other states were to appoint each their own judge. Two plans of a similar character were presented. According to one, the American states as a unit were to choose four judges, and the other nations together thirteen judges. A second plan fixed electoral circuits solely according to population. Bustamante [1] in particular pointed out the impracticability of this system, because the neighbour states within a given circuit, who frequently, as in South America, have boundary disputes with one another, would never agree upon the choice of a judge. According to another proposal eight of the great powers and nine other states, which together represented the entire rest of the world, were each to be entrusted by the Conference with the selection of an arbitrator. These proposals were not given detailed consideration. The chief battle at the Conference was fought over the so-called 'rotation system'. According to that plan each state was to appoint a judge for a period of twelve years, but the individual judges were to sit for unequal periods. Only the great powers were to be represented upon the tribunal for the full twelve years; while the other states were to be represented for only ten years, four years, two years, and one year. A classification of states was also drawn up according to which population, territorial extent, political position, and wealth of the individual countries, as well as commercial and industrial interests, number of colonies, and varieties of language and of legal systems (Roman law, common law—in its English and in its modified American form,—Spanish law—with its European and American variations,—&c., were to be

[1] p. 185.

properly represented upon the tribunal) were taken into consideration. According to this classification the states represented upon the tribunal each by a judge and deputy judge were as follows:

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|---|---|
| Germany, United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, for . . . . . | 12 years. |
| Spain, Netherlands, Turkey, for . . . | 10 years. |
| Argentine, Belgium, Brazil, Chile, China, Denmark, Greece, Mexico, Norway, Portugal, Roumania, Sweden, and Switzerland, for . . . . . | 4 years. |
| Bulgaria, Persia, Serbia, and Siam, for. . | 2 years. |
| Bolivia, Columbia, Costa Rica, Cuba, San Domingo, Ecuador, Guatemala, Haiti, Honduras, Luxemburg, Montenegro, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay, and Venezuela, for . | 1 year. |

Certain states, in particular Brazil, promptly declared that this plan was unacceptable. The Brazilian spokesman, Barbosa, on August 20, 1907, at the third session of the *Comité d'examen B*, brought forward another proposal. This proposal, like that of a draft laid before the Conference by Russia, aimed to perfect the Hague Arbitration Court of 1899. The Russian draft had provided that the members of the arbitration court were to assemble every year in full session. At this session the members of the arbitration court were to become acquainted with one another, and, above all, were to elect by ballot a commission of three or more members who were to hold themselves ready at all times to decide disputes. It was hoped that in this way a single and undivided court would be rendered possible in the future, instead of adding a new court to the old Arbitral Court of 1899. For the same reason it was later

advocated that the members of the new court should only be chosen from among the members of the old one.

The Brazilian proposal provided that each state should appoint a member for the arbitral court. Brazil hoped that every state would not appoint a judge, or that a number of states would agree together upon the appointment of a single judge, so that in this way the number of judges would be as small as possible. Each judge was to remain in office for nine years. After the erection of the new court the old one was to be done away with. Each state was to pay the judge appointed by it. The members of the court appointed by the individual states were to be divided into three groups according to alphabetical order. Each group was to constitute a tribunal for three years, and its members were to reside near enough to The Hague to be able to arrive there within twenty-four hours. The parties were to be free to submit their dispute to certain persons selected from the list of the Hague Court or to the whole body of the Hague Court then in session. This proposal likewise found no favour. It was thought that the grouping in alphabetical order would leave too much room to chance, and the majority of the states could not reconcile themselves to the fact that they would be represented upon the tribunal for only three years out of nine.

The following additional projects were thereupon laid before the Conference, but they also found no favour :

1. The judges were to be chosen by the Conference, and were to exercise their functions temporarily until the next Conference ;
2. Seventeen states were to be selected by the Conference, which were each to appoint a judge ;
3. Each state was to have an equal right to propose a judge, and those judges were to be regarded as elected who received the most votes ;

4. Each state was to name a person, and the persons so named were together to appoint the judges. A particular form of this proposal provided that the judges of the old Permanent Court should appoint fifteen judges from among themselves.

In order to pass upon all these plans properly we must divide them into two classes, into those which have in view the equality of states, and those which do not have it in view. To the last class belongs in particular the so-called rotation system, which received the most serious consideration of the Conference. In endeavouring to answer the question whether it was right that the great powers should claim for themselves a stronger representation upon the Permanent Court we are led to the following result.

The task of an international judge should properly be to look after the interests of the community of states, not after the interests of the individual state which has appointed him. The individual judge must decide not as a German, a Frenchman or an Englishman, but as an international judge. The idea that the great powers must be more strongly represented upon an international tribunal than the smaller states is only intelligible under the belief that the judges must represent the interests of the states by whom they were appointed. But this belief is a mistaken one, and it follows therefore that the rotation system is not justified.

It may now be objected that international judges are not only to expound the law and to render decisions, but they must also create new law where there are gaps in international law, and are to that extent also law-makers. Granted, it is said, that an impartial settlement of the affair would be the result of a strictly legal decision, yet

where the court is acting as an international legislature it must naturally give weight to the interests of each state, and arrange a compromise between the conflicting interests.

On the contrary, it must be pointed out first of all, and here I am in full accord with Schücking,[1] that the decisions of the highest international court have never the binding force of laws when they have contributed to the making of new law. International judgments have no greater binding force than, for example, the decisions of the German Imperial Court. If a decision of the highest court of the world appears incorrect to the other states, they are all free to make a new law by international treaty, and thus settle conclusively a matter hitherto resting only upon the authority of the court. Moreover, each individual state may, in particularly important cases, declare that it is not willing to recognize a special decision of the world court as binding upon itself (though this may not of course be done if the state is itself a party to the dispute). But this declaration will not in general be necessary. Article 84 of the Hague Convention for the pacific settlement of international disputes, already provides that 'the award is only binding on the parties to the proceedings'. Moreover, a decision rendered by the world court has only a moral force, which states can set aside in exceptional cases.

But even if international decisions had the force of laws it would not follow that the individual states should have an unequal share in the making of these laws by the supreme court. At the present day the only approved international legislative body, as Oppenheim,[2] Huber,[3] and Zorn[4] have in particular pointed out, is one in the form of an inter-

[1] Op. cit., p. 139. [2] *Die Zukunft des Völkerrechts*, p. 33.
[3] *Die Gleichheit der Staaten*, p. 108 et seq.
[4] *Festgabe für Güterbock*, p. 207 et seq.

national conference at which each state has an equal vote. Moreover, if at the present day the complete equality of states in the international legislative body has been recognized we may indeed ask with surprise, as Matte [1] has done, why this principle has been departed from in the case of the supreme international court ?

Matte argues thus: 'If each state at the Conference votes as a unit for the adoption of each and all the resolutions of the Conference, why should there be a different representation in the judicial organization entrusted with putting those resolutions into execution ? '

If later on a legislative body should be introduced into international law, in which resolutions would be passed by a majority of votes, in such a case there might be a question of giving more votes to the larger states than to the smaller ones.[2] An international legislative body acts always by compromise, as our experience of the London Naval Conference well shows. The larger states have in this instance more interests to be represented than the smaller states. But in the case of the international court the chief concern consists in a fair adjustment of individual interests, not in a struggle of those interests in which might makes right. This has been emphasized, for example, by Moch in his work *Autour de la Conférence.*[3] Scott [4] also pointed out in 1907 that 'a court is neither a legislative nor a deliberative body', but he failed to draw the necessary conclusions. The distinguished Swiss jurist, Huber, has given expression to this idea in the following striking words:

> In the case of a judicial body it must be assumed that the influence of power is entirely eliminated. The only

[1] p. 180.

[2] Quidde, *Zur Organisation der Interparlamentarischen Union*, 1911, p. 23 [3] p. 26 [4] p. 316.

> interest which is really entitled to be decisive in the constitution of permanent courts concerns the excellence of the personnel of the court. If the lesser powers, by reason of their smaller share in the appointment of judges, cannot have complete confidence in the court, the objection must be met by directing attention to a suitable method of selecting the judges and to a comprehensive regulation of their qualifications, not by taking into account in the composition of the court an influence which, in the last instance, rests only upon political power entirely foreign to the idea of justice.[1]

The only influence which at first sight could be decisive in favour of allotting a larger number of judges to the great powers would perhaps be the fact that the great powers resort to the court more frequently.[2] Accordingly Scott[3] thinks that it is an argument for the system of rotation when he says that 'the interests of a great state with a large population extend very far, are in fact world-wide, and it is, above all, in connexion with these interests that disputes apparently arise'. But if the states have really the intention of creating an impartial tribunal, this very fact would argue with considerably greater force that the great powers should not be too strongly represented upon the tribunal. For since the great powers resort more than others to the court, if they possessed a particularly large number of judges, there would always be national judges upon the tribunal, and the principle that 'no man can be a judge in his own case' would be completely set aside. The population of individual states should, as Scott proposed, only be considered as a basis for representation of the states upon the tribunal if the greater representation

[1] Smith, *Proceedings of the American Society of International Law*, vol. ii, pp. 95 et seq., holds the opposite view.

[2] See p. 156 of my commentary upon the Convention for the pacific settlement of international disputes.

[3] p. 318.

upon the tribunal of the interests of the individual parties would secure a better decision. But, unquestionably, precisely the opposite is the case. This fact was strikingly recognized by the commission appointed by the Interparliamentary Union at its meeting at The Hague in 1894. It feared that if the great powers were to have a larger number of members of the arbitration court, in disputes between these same powers there would frequently not be enough judges.[1]

From whatever point of view the apportionment of judges according to the rotation system be regarded, the conclusion in every case is that the plan must be unconditionally rejected. It is impossible, as Huber also says,[2] to find any scheme of gradation for a system of rotation. The smaller and the medium-sized states were entirely right in having nothing to do with such a system.

Schücking,[3] who also rejects the system of rotation, thinks that in favour of an apportionment of judges according to population the fact can be adduced that the interests of a world power with 65,000,000 citizens in a new truly permanent international court of justice is much greater than in the case of a small state with 4,000,000 inhabitants. Granting that the point is well taken, it must be categorically denied that the great power which has a larger interest in the existence of the international court would also have a larger interest in being specially represented upon the tribunal. Quite the contrary! The greater the advantages which a great power may expect from a truly ideal court, the more will it urge an impartial composition of that court. But this will be entirely impossible if the great power is to have a larger share in

[1] Of the same opinion is Bustamante, p. 185.

[2] Op. cit., p. 107.

[3] Op. cit., chap. iv, sec. 5.

the appointment of members, and a consequently stronger representation upon the court.

Oppenheim [1] has recently advocated the unequal apportionment of judges, and asserts that the principle of the equality of states has after all nothing to do with the composition of an international court, so long as no state is forced against its will to resort to such a court. On the contrary it must be insisted that according to the principle of the equality of states an equal right must be secured to every state upon the tribunal created by all the powers together, and the circumstance of the voluntary or enforced resort to this tribunal has nothing to do with the matter. An enforced resort to a tribunal is entirely out of the question in international law. All states must, as Schücking [2] also has pointed out, be allowed to share equally in the work of perfecting the organization of states, which urgently calls for a permanent court of justice.

In addition to Oppenheim, the majority of recent writers advocate an unequal apportionment of judges; among them are Pohl,[3] Ozanam,[4] Lawrence,[5] Despagnet,[6] Higgins,[7] de Louter,[8] Schücking,[9] and Fried.[10]

Apart from Huber, Bustamante,[11] Nippold,[12] and Fischer [13] have vigorously rejected the idea of an unequal apportionment of judges.

It is quite significant that before the meeting of the Second Hague Peace Conference the principle of the

[1] *Die Zukunft des Völkerrechts*, p. 43. [2] Op. cit.
[3] *Deutsche Prisengerichtsbarkeit*, p. 144.
[4] *La juridiction internationale des prises maritimes*, p. 171.
[5] *The Principles of International Law*, p. 583; *International Problems and Hague Conferences*, p. 75. [6] pp. 1359 et seq.
[7] p. 517. [8] Vol. ii, p. 158. [9] Op. cit.
[10] *Zweite Haager Konferenz*, p. 117. [11] pp. 184 et seq.
[12] *Die zweite Haager Konferenz*, vol. ii, p. 255. [13] p. 11.

equality of states only rarely came into question in connexion with a proposed international law court. Rather, with the exception of Schlief,[1] all writers of consequence, in particular, Kamarovski,[2] considered that this principle must necessarily be followed. It was only to the Turks[3] that certain authors, such as Kamarovski, wished to deny a vote upon the court. The possibility of an unequal representation of states upon the court was likewise considered by the commission of the Interparliamentary Union at its meeting at The Hague; but it likewise came to the conclusion, as Stanhope[4] had already done, and later Descamps also,[5] that the principle of the equal representation of all states should be upheld. Schlief is led to propose a system of unequal representation because he sets up the false principle that 'the members of the court of justice are not identical with the ordinary incumbents of a judicial office, but are merely representatives of their states. . . . The members must naturally proceed and vote strictly according to the instructions of their governments'.[6] Schlief then compares the representation upon the court of justice with the representation of the German federal states in the Bundesrat, and thus confounds judicial and legislative bodies.

The determination of a system of unequal representation

[1] *Der Friede in Europa*, pp. 292 et seq. [2] p. 499.

[3] It is interesting to note how this idea of the exclusion of the Turks from the European family of nations is constantly recurring. Compare especially Schücking, *Die Organisation der Welt*, and the plans there discussed of Dubois, Podebrad, Sully, and Alberoni. The well-known Dutch international law jurist, van Daehne van Varick, has recently again raised this question in his article, *La révolution et la question d'Orient* (Hague, 1911), and advocates a crusade against the Turks and the German protectorate over Syria.

[4] *Conférence interparlementaire*, p. 228. [5] *Denkschrift*, p. 72.

[6] pp. 298, 300.

of states upon the court would have. moreover, the further great disadvantage that the whole apportionment would be broken up if only one of the forty-five states failed to ratify the convention. Barbosa [1] pointed out this objection in 1907.

At the meeting of the American Society of International Law [2] all of the speakers except Aymar declared the equality of states to be a fiction, and laid down as postulate the principle of the inequality of states. Even if this assertion were true as a general proposition, the question must be raised whether this principle is also applicable to the composition of an international court, or whether in this particular case an exception should not be made from the principle of inequality (which is now even more than formerly an incorrect principle of international law).

After all, I can find no reason why states should be represented upon the court of justice. We need international judges who, in fulfilling the functions of their office, will consider themselves as little as possible the nationals of a particular country. If it is in fact not possible to de-nationalize the judges, as Scott [3] has rightly pointed out, yet we must do all in our power to prevent the judges from regarding themselves as representatives of their countries. But this will always be more or less the case if the individual states appoint the judges. Accordingly some other method of selecting the judges must be advocated.

In making this demand we must first of all point out that the Supreme Court of the United States of North America likewise consists of judges who are not appointed by the individual states, but by the President with the

[1] p. 618. [2] 1909, pp. 238 et seq.
[3] p. 319; *Revue générale*, 1911, p. 225.

approval of the Senate.[1] It must also be remembered that between the individual states of the United States, and indeed between the individual states of a federal state, there do not exist such important differences as between many states of the world. The Supreme Court never has to decide questions which might almost lead to war, as must the highest court of the world, even if its chief duty will be to pass upon questions more of a legal nature. Accordingly, it is all the more imperative that the composition of the world court be an impartial one. If in the case of the highest court of the United States, the appointment of judges is not in the hands of the individual states, how much more must the same principle be followed in the case of the new world court!

Many judges will be influenced by sympathies and by prejudices, not only in the case of disputes which concern their own state, but also in disputes between foreign powers. There are but very few men who are so free from passion as to be worthy of a position upon the world court of justice. For that very reason every possible guarantee must be given that only the best and the noblest men will be international judges.

All the more caution in the selection of judges will be needed because the positions upon the international court of justice are not very numerous, and each state will have at most only one judge to appoint. Can the individual states be trusted to be so unselfish as to waive in the selection of judges every test of national loyalty, and on the contrary select persons who will look only to the welfare of the community, and not merely to that of their own state?

A further reason why the judges should not be appointed

[1] See in this connexion, e.g., Montague, *Proceedings*, pp. 214 et seq.

by the states directly is this. I have in mind the case that a judge like Lammasch, who enjoys throughout the world a singular esteem as an international judge, might not be appointed as a member of the court by the ministry then in power for reasons of one kind or another, whether personal or political; or again the case that a state might not possess at the time a citizen who is specially qualified for the office of an international judge, whereas another state might have two unusually able international jurists. Look, for example, at the case of Holland, which has at its disposal a particularly large number of international jurists —men such as Asser, Loeff, and de Savornin Lohman! Now the community of states would be able to make no use of the distinguished services of these men, if each state could only appoint one judge, or if indeed the absurd system of rotation brought it about that the nationals of states such as Holland and Belgium had only temporary positions upon the court. It is no answer to these facts to point out that such distinguished men might perhaps be appointed by other states in case their own state was not in a position to appoint them. For if each state may appoint only one judge upon the tribunal, it will without any doubt designate one of its own citizens. I have before me the list of the present judges of the Hague Permanent Court, and I find that not a single state has appointed a national of a foreign power, and this in spite of the fact that each government may appoint not one but four judges.

Hence some method of selection must be introduced by which only the most distinguished men throughout the world will be appointed to positions upon the world court. without respect to the state of which they are citizens. For that reason I regard as unsuitable all the proposals of the Second Hague Peace Conference, according to which

the states themselves were to appoint the judges; rather, the appointment must be made by an approved international board. This board is to be composed not of diplomats, but only of international jurists of high standing. If the list of the present Hague Permanent Court were to be so formed that no diplomats, but only international jurists, should be represented upon it (and not many changes would be necessary for this, since there are only very few diplomats represented in the list, Germany and Austria-Hungary having appointed only jurists), we would have a body of persons by whom the new court could be constituted, and there would be created at the same time a connexion between the Permanent Court of 1899 and the new court of justice. It was in this way that Bourgeois also wished to see the question settled at the Second Peace Conference.

Oppenheim [1] also makes the following very apt remark: 'It might be possible to constitute an international court which sets aside entirely the principle that definite states must be represented upon it, and perhaps such a court may be possible in the future, when more confidence is placed in the judicial settlement of international disputes.' Mougins de Roquefort [2] has already pointed out that there would be more guarantees for the impartiality of a tribunal if the states were not themselves to appoint the judges.

It appears that in America also it has been gradually perceived of late that the judges are only representatives of the international community, and accordingly should be appointed only by an organ of the body of states, and not by the individual governments. Th. R. White, in a brilliant address before the Lake Mohonk Conference of 1911,[3]

[1] *Die Zukunft des Völkerrechts*, p. 44.
[2] p. 216. [3] *Report*, pp. 104 et seq.

expressed this idea, with great earnestness. White does not want the judges of the new court to be appointed by the states themselves, and proposes the creation of a board, not too large, which will act as the agent of all the states for the purpose of selecting the body of judges.

In this connexion I think that Huber [1] is not justified when he speaks as follows of this and similar plans:

> These proposals would, to be sure, have satisfied the equality of states, but, on the other hand, would have done an injury to the unity of the court and to the uniformity of its composition. But, above all, such a method of composing the court offered to the more influential states no security for a position upon the court corresponding to their political significance.

First of all as regards the last statement of Huber, I cannot understand, as I have insisted above, why the larger states should have a larger representation upon the tribunal. The mistaken idea that the individual judges are representatives of their states and not of the international community is here in evidence.

If the judges are representatives of the community of states, it will be a matter of entire indifference to the individual state whether it has one national more or less upon the court. For this national must, in conformity with the oath which he takes as judge, regard himself only as a representative of the community of states.

I also consider Huber's criticism with respect to the uniform composition of the court unfounded. The representation of all the particular legal systems upon the tribunal is not at all necessary in the case of questions of strict international law, but only in the case of questions belonging to international private law, which must come

[1] *Jahrbuch des öffentlichen Rechts*, vol. ii, p. 511.

before another court, that is, before another jurisdiction. In the case of questions of international law it is only important that there be upon the court persons who know the legal systems which are in force in the countries of the disputants. For this reason and also because of difficulties arising from the languages used, it will often be necessary to enlarge the court *ad hoc*. Citizens of the various states will naturally be appointed as far as possible, and as it is hoped that in time a number of judicial bodies will be established, it will be quite possible that at the same time citizens of almost all the states, in so far as they can offer good international judges, will sit upon the court. A number of nationals of the same state will not be appointed without necessity, but only when such a state has at its disposal two jurists of such distinction that they cannot be denied a place upon the supreme court of the world.

### 6. Other Features of the Organization and Procedure of the Court of Justice

If it were decided to confer upon the judges inscribed on the list of the present Hague Court the right to appoint the members of the new court, this would secure at the same time that the judges would not be subject to removal, as has been rightly advocated by Bustamante,[1] Scott,[2] Mérey,[3] and Bourgeois.[4] For as the states would not themselves appoint the judges they would also have no right to remove them, as they have in the case of the present Hague Permanent Court. It is true that even in the case of the Permanent Court, as Schücking[5] remarks, the removal of judges cannot be justified legally. But it is

[1] *La Seconde Conférence*, p. 205. [2] p. 317. [3] pp. 615, 667.
[4] p. 615. [5] Op. cit., p. 52.

clear from the report of the First Hague Conference and from the proceedings of the Second Conference, that it was not desired to deprive states of this right in fact.

As regards the right to remove judges, the proposal of Kriege [1] that it should be turned over to a higher court could not be carried out. But there would be hardly any hesitation in entrusting this right to the Administrative Council of the present Hague Permanent Court. If a right of removal were admitted the judges would be at least removable in case of unworthiness, &c., as Lammasch and Baron Marschall [2] in particular advocated in 1907. To make the moral responsibility of the parties the sole guarantee that the judges will not be removed, as Renault [1] proposed, does not seem to me wise.

No doubt this right of removal will have the result that states need not leave their cases to be decided by unworthy persons. But further security yet must be given that the judges will enjoy the confidence of the parties in the highest degree. Fixed conditions must be laid down under which a judge may not exercise the functions of his office. I have in mind in particular a case which the International Law Association also contemplated in its project of 1895 framed to protect states from unsuitable judges, namely, the case in which the judges might have a personal interest in the result of the dispute. But when this project also held as prejudiced judges who had already in their writings and addresses, or as members of courts, expressed their opinion upon the same question of law, it went too far. Under such a rule it would be quite impossible for a judge to render his decision a number of times upon the same legal question.

But the exclusion of prejudiced judges would not give states a complete guarantee: in addition, each state which

[1] p. 667. [2] p. 615.

resorts to the court must have a right of challenge which will enable it to reject at the start two judges out of five, three judges out of seven, &c. The places of the judges thus struck out must be filled at first from the general body of the reserve judges of the international court. The challenging of a given judge need not at all imply a lack of confidence in him, and no reason must be given for so doing. I am convinced that the states will make use of this right of challenge only in special cases. In 1907 Lammasch [1] in particular proposed that a qualified right of challenge be given to the disputants. He observed very justly that 'we live to-day under a system of political alliances and it is possible that more than one of the judges of the committee will be appointed by the ally of one of the parties. . . . The right of challenge would have the further effect of removing all fear of the concentration of the powers of the committee in the hands of a very limited number of members.' Crowe was wrong in fearing that under this method the best judges would be set aside.

The right of removal and of challenge would completely prevent the judges from obtaining too great power over the states, as Barbosa [2] in particular, as well as Mérignhac,[3] feared when he declared: 'Above all think of the position of the judges of this court, which is possessed of a power unequalled in the world!'

Finally, as regards the regulation of the procedure of the new court, it follows from what has been said that the judges of the new court must render a detailed opinion in connexion with their decision. Further, a court of appeal must be set up, which is not a difficult matter in the case of a permanent court, as Descamps [4] has already shown.

[1] p. 652.
[2] p. 344.
[3] *L'Arbitrage*, p. 428.
[4] *Denkschrift*, p. 55.

The states must be secured against errors of law, as Kamarovski and Mérignhac have already clearly pointed out. Moreover, an action in annulment must be allowed in certain cases. Thus, Baron Marschall referred in 1907 to the case in which the judges might have used more or less offensive expressions against one of the parties in their decision. As a precaution against this he advocated the presence of national judges. But in my opinion the court will overstep its jurisdiction in this way so rarely that in practice an action in annulment will answer the purpose.

Special attention would further be given to the question of languages, upon which I have expressed myself on page 111 of my commentary. Here also some form of a court of changing composition appears indispensable. The entire body of the international court of justice would first have to determine which group of judges was to have jurisdiction in case a special knowledge of languages should be required in a given instance. The friends of Esperanto have repeatedly endeavoured to show that all the difficulties of language could be avoided through the use of Esperanto. Even Schlief [1] has opposed this. Until Esperanto has come into much wider use this idea cannot be given further consideration. But I will gladly repeat here the view of the treatise *Germana Esperantisto*,[2] quoted in connexion with statements made on pp. 31, 32 of my article, 'An International Court of Justice for Private Claims':

> These difficulties could easily be removed by the use of Esperanto. First of all there is already a considerable number of persons who know Esperanto, and who could act as arbitrators upon such a court. But as the language is exceedingly easy to learn, as soon as such a court could be erected there would soon be found the necessary number of judges, attorneys, and secretaries familiar

[1] *Der Friede in Europa*, p. 313.

[2] Berlin, 1911, p. 234.

> with Esperanto. Hence there would only remain the task of translating the necessary documents into Esperanto. All those who have looked into this question carefully know that no other language is so well adapted to reproduce the finest shades of thought of the original as is Esperanto.

That may be true. But can a translation ever supply for the original, when it is a question often of the meaning of each individual word ?

Finally, in connexion with the new court there would be established a permanent body of attorneys who would naturally be much more capable than the present agents and counsel, who vary with each case. Not only would there be the advantage that judges and attorneys would come to know one another better, but the attorneys would thenceforth hold their position for life, and accordingly would become more familiar with the methods of procedure and with the principles of international law than has hitherto been the case. Their great and valuable services, which, as Wambaugh[1] says, have not yet been properly estimated, would in a greater measure than hitherto influence the development of procedure in a manner which would contribute to the development of international law. The judges and attorneys of the supreme court would then be real practitioners. The entirely unsatisfactory condition of things, under which the most important and difficult questions of law in the world are decided by jurists who are at the same time judges and attorneys upon the Hague Court of Arbitration, must cease. The office of an international judge and of an international attorney is indeed sufficiently honourable that international jurists should devote their whole life to it.

[1] *Proceedings*, p. 142.

It is also evident that states need not turn over to the supreme court of the world all or even the most important disputes; I am convinced that states certainly need not submit questions of honour and vital interests to the supreme court in accordance with an obligatory world arbitration treaty. States must be unquestionably allowed to interpose the objection that a dispute affects their honour or their vital interests, as a final bar to an action against them.

If this guarantee be given I see no reason why we should not set aside the *compromis*, which involves a waste of time and is often difficult to draw up. On the contrary, it must be recognized that each state possesses the right upon its own motion to institute an action for the settlement of strictly legal disputes with another state in a strictly legal way. It must be understood, of course, that here also diplomatic negotiations have failed to bring about a settlement. The fact that as prudent and learned a man as Privy Councillor Zorn, in spite of his rejection of obligatory arbitral agreements, is not opposed to a unilateral right of action under these circumstances is evident from the fact that in his inaugural address as rector he supported the memorial of the leaders of the Berlin Chamber of Commerce in favour of an international court for private claims. For according to this project private persons will be given a direct right of action against debtor states. In the project of an International Prize Court, and in the Central American Court of Justice which has been long in existence, we have significant models for the creation of such a direct right of action, as has also been advocated by Dumas. Moreover, Article 53, paragraph 2, No. 2 of the Convention for the pacific settlement of international disputes has already provided that upon motion of only one of the

parties the Permanent Court is competent to settle the *compromis* under certain conditions.[1] Just as this form of compulsory *compromis* is only possible by the agreement of both parties, so a unilateral right of action even in the individual concrete case would have to be in accordance with the wishes of both parties.

In case such a unilateral right of action should be granted, guarantees would have to be given that judgments by default would be excluded, since they clearly have no place in disputes between states. It must be accepted as a self-evident proposition in this connexion that no state will refuse to answer to a process without cause. It has never thus far happened that a state has evaded a decision of an international arbitration court. Accordingly we may assume that there would be an equal willingness to fulfil treaty obligations with respect to an action before the court of justice. But if a state should refuse to answer to an action, international law does not provide a formal remedy, and we must be content with the fact that such a state draws down upon itself by its manner of acting other evils of various kinds, the chief of which is that it destroys the confidence of other governments in its good faith. Why, therefore, spoil in the minds of states the whole idea of an international judiciary by creating an executory jurisdiction or by admitting the possibility of a judgment by default!

But, it may be said, are not states legally obligated to answer to an action, and in consequence must not those states recognize judgments by default which are willing to allow the arbitrators under certain circumstances the right to fix a period for the fulfilment of the arbitral award? This question must be answered in the negative, because in the case of a judgment by default there exists the

[1] See pp. 99 et seq. of my commentary.

express or implied declaration of one party that it will not answer to the action, whereas such is not the case when a period is fixed for the execution of the arbitral award. Those forms only of international procedure are inadmissible which are contrary to the express or implied consent of the parties.

But if an agreement should not be reached with respect to a unilateral right of action, in that case the new court of justice must be declared competent to settle the *compromis* at the request of only one party. But the *compromis* should not be thus formulated without previous oral negotiations between the parties, in order that through the appearance of both parties evidence may be given of their express agreement that the terms of the *compromis* shall be settled unilaterally. Should one of the parties not be willing to enter into these negotiations a *compromis* should not be drawn up. It is not well, as is provided in Article 19, paragraph 2, no. 1 of the Draft Convention relative to the creation of a Judicial Arbitration Court, to have the compulsory *compromis* drawn up unless both parties co-operate in it.[1]

However, I must not enter into further details with respect to the establishment of the permanent court of justice. For it is not for me to add a new project to the large number of those already on hand. I shall merely endeavour to clear up the more important aspects of the question. I might lay stress, however, upon the fact that I am in full accord with Schücking when he advocates the greatest possible organic connexion between the old Permanent Court of 1899 and the new court of justice.

It is not at all necessary to delay the establishment of a permanent international court of justice until an obliga-

[1] See p. 103 of my commentary.

tory arbitration treaty between all nations has been entered into. For even without such a treaty the court of justice will have enough to do if the states are willing to refer many cases to it for decision. But it is evident that an obligatory arbitration treaty between all nations would be of advantage to the permanent court of justice, and Bourgeois, d'Oliveira, de Soveral,[1] and Milovanovitch[2] are to that extent right in thinking that the question of the adjective and that of the substantive law are closely connected. Descamps in his memorandum[3] and Schücking[4] have also laid stress upon this. An arbitration treaty between all nations would bring before the new court particularly those disputes which are not overmuch political in character. For as Scott[5] says in his masterly report, disputes which are rather legal in character must be referred to the new court of justice, and, on the other hand, disputes of a political character must be referred to the old Court of Arbitration of 1899. To be sure, an objective distinction between legal and political questions is hardly possible; in the last instance the parties themselves must always decide whether they regard a dispute as legal rather than political in character. But it would be entirely satisfactory to withdraw from the competence of the court of justice those political questions which at the same time affect the vital interests of a nation. If, therefore, this clause is introduced into the arbitration treaty between all nations, such as is advocated above, all disputes can be turned over to the new court of justice. The old Court of Arbitration would then only be resorted to in accordance with special arbitration treaties.

That numerous disputes would be turned over to an

[1] p. 346. [2] p. 335. [3] p. 50.
[4] Op. cit., p. 152. [5] Vol. i, p. 348.

international court of justice has been asserted in particular by Baron Marschall at the Second Hague Conference in the following words : [1]

> A truly permanent arbitration court will automatically attract disputes to it. There are enough on hand in the archives of governments.[2]

The contrary view of Mérignhac [3] and of von Bar [4] is untenable at the present day. Fried [5] is not wrong when he says ' it is possible that while we must now look for judges in order to settle a dispute, we shall henceforth look for disputes in order to keep a body of judges busy '.

Moreover, even after an arbitration treaty between all nations has been entered into, the court of justice will still not have jurisdiction if both parties should be agreed to turn over the question to a special arbitration court.

A number of persons, e. g., Barbosa [6] and Zorn,[7] have asserted that there is no need at all for two international permanent arbitration courts. But they do not reflect that entirely different tasks will be assigned to the old Arbitration Court and to the new court of justice. Numerous disputes would without doubt be turned over to the new court of justice on account of the lesser expense, thus justifying the existence of the International Bureau, so that continued existence of the old Permanent Court, even if it should be no longer put to use by the nations, would not involve the slightest cost or trouble. If the old Court of Arbitration should no longer be put to use by the powers after the erection of the new court, there would certainly

[1] p. 595.

[2] See also Marburg, *Proceedings*, p. x ; Scott, p. 317 ; and Choate, p. 594.

[3] *L'Arbitrage*, p. 428. [4] *Berliner Tageblatt*, August 22, 1907.

[5] *Pester Lloyd*, 1907, vol. 8, p. viii.

[6] p. 620. [7] *Zeitschrift für Politik*, vol. ii, p. 350.

be no need to continue it in existence. The question is, then, which court is necessary. In my opinion, the new court is in any case indispensable, and accordingly those who want only one court must forego the old Court of Arbitration.[1]

In the case of the smaller international differences it would be possible henceforth to have them settled in a strictly legal way. If a state desired to do that at the present time, and had special judges brought to The Hague for each individual case, international jurists would soon hesitate to abandon temporarily their profession on account of a trifling object, and there would soon be a lack of suitable judges. For this reason, as well as on account of the relatively great expense involved, only the most important questions have thus far been submitted to the Hague Court of Arbitration, as has already been pointed out above. Those very disputes which are in themselves insignificant often contain questions the strictly legal settlement of which would be of benefit to international law.

A permanent court of justice would by its decisions not only contribute directly to the development of international law, but by its very existence would prepare the way for a gradual codification of international law, as Marburg[2] aptly observes.

Even though the new court of justice should after all not decide any disputes which endanger the vital interests of one of the parties, that would not prevent it from settling, at the mutual request of the parties, serious dissensions endangering the peace; and it would thereby directly further the cause of world peace, instead of merely doing

[1] See the excellent remarks of Schücking, op. cit., pp. 91, 92, against Zorn's contrary opinion.

[2] *Proceedings*, p. xv.

so by hastening the organization of the community of states through the development of international law.

Finally, the great moral influence which the very existence of a permanent international court of justice exercises over nations is not to be under-estimated. Descamps [1] has already pointed this out in forcible terms. The international court of justice embodies the idea that all of the disputes which arise between nations and which are susceptible of a strictly legal settlement can best be decided by a supreme court, in case there are difficulties in the way of diplomatic settlement. The fact that in international life law is being more and more substituted for force is a much more potent sign than the present arbitration court. This is also the view of Hull [2] and of Schücking.[3]

The above statements are made upon the hypothesis that the new court will be in reality a 'judicial tribunal', and not a 'political or diplomatic Areopagus'.[4] 'Its prime function is to interpret the law and to apply it to a concrete case. . . . What we desire are fixed juridical rules and an equally certain interpretation of those rules.' Only in that case will the international court of justice serve both to secure international peace and to develop international law, and thus justify its existence side by side with the Hague Permanent Court of 1899.

[1] *Denkschrift*, p. 51.
[2] *Proceedings of the Second National Peace Congress*, 1909, p. 219.
[3] Op. cit., p. 90.
[4] Scott, p. 316.

## CHAPTER V

### THE TECHNICAL ADVANTAGES OF A PERMANENT COURT OF JUSTICE. GREATER PROMPTNESS AND LESS EXPENSE IN THE SETTLEMENT OF CASES

If, then, we have seen that a permanent international court can alone guarantee the development of international law, a permanent court is also for technical reasons to be preferred to a tribunal organized for each case, in so far as the settlement of strictly legal disputes is concerned.

First of all it must be observed that a court of justice, whose members know one another well and are bound together by reason of their long work in common, is of more value than a court constituted for each case. Only when the individual members are intimate with one another is real co-operation possible. It may, for example, happen that a judge, who is in other respects distinguished and possessed of a shrewd insight for important questions, is a poor speaker and cannot give proper expression to his thoughts. If a man of this kind joins in with a body of judges who do not understand his individuality, they will as a rule imagine that he is not a particularly competent jurist, and will regard his opinions sceptically. This will make co-operation more difficult. The deliberations of the body of judges will be of quite a different character if each one knows that the opinions of this judge are always very clear-cut and deserving of consideration. If the personality of an individual judge is well known his opinions will be more highly valued by his fellow judges. If the judges are well known to one another they will more readily exchange

in a confidential way their private views upon the particular object of dispute. They will discuss questions with one another not only as jurists, but at the same time as men who have in view the supreme interests of mankind. All this will greatly help to bring about a good decision. I recall merely the well-known remarkable co-operation of the members of the Committee of Examination of the First Hague Peace Conference as an ever laudable example of noble work in concert. When such relations exist between them, the high ideals which certainly animate many judges will be communicated to their colleagues. This is a matter not to be under-estimated. Scott puts the case well in his report:[1]

> The intercourse of the judges in view of the analysis and of the development of international law, their co-operation in judicial decisions, will necessarily develop an *esprit de corps*, which will have an inevitable influence upon each of them in the accomplishment of his duties. In the contact of judicial responsibilities, individual opinions, and even individual prejudices, will lose something of their rigidity, and the decisions of the court will furnish the greatest guarantee of international impartiality.

Moreover, a court whose members are on intimate terms with one another will certainly be able to settle a case more quickly; and assuredly the strictly permanent nature of the court of justice will greatly contribute to this end. Esteva,[2] Bourgeois,[3] Marschall,[4] and Asser[5] in particular laid stress upon this point in 1907. The appointment of judges to the special arbitration courts has indeed repeatedly taken up too much time. For that reason Descamps[6] has already advocated a permanent tribunal.

[1] Vol. i, p. 362. [2] p. 335. [3] p. 347.
[4] p. 594. [5] p. 595. [6] *Denkschrift*, p. 46.

The judges appointed in the Muscat case were after a month unable to agree upon the selection of the umpire, and recourse had to be had to the provision of the *compromis*, according to which the King of Italy was given the right to appoint the third judge. The decision of the King of Italy likewise consumed much time. At the meeting of the Venezuelan arbitration court on September 1, 1903, only a single judge was present, because the two others could not yet be appointed. Even with the help of modern means of communication it is impossible to constitute the tribunal more quickly in such cases, as Zorn [1] mistakenly thinks. Lammasch, the most distinguished international arbitrator, clearly says: 'Without doubt the meeting of the arbitration court would have been helped, hastened and facilitated if, having been constituted in advance, it had not been necessary to constitute it at the time.' [2]

It is true that the time between the constitution of the tribunal and its meeting would only be slightly shortened by means of a permanent court of justice, because each case would require longer preparation.

The experience in strictly technical procedure which the judges upon a permanent court would have acquired by their profession, would contribute greatly to the more prompt settlement of a case.

Similarly, I insist, in opposition to Brun,[3] that the question of expense argues forcibly in favour of a permanent international court. In my commentary [4] I showed, in agreement with Mérignhac, that there is no justification for the assertion that a truly permanent court of arbitration is less expensive. But in making this statement I had in

[1] *Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit*, p. 44.
[2] *Recht*, 1911, p. 146; Schücking is of the same opinion, op. cit., p. 91.
[3] p. 148. [4] p. 157.

mind merely international arbitration, which has for its object simply to dispose of disputes, and not international judicial settlement, which at the same time contributes to the development of international law. So long as the attitude is taken that international procedure exists merely for the adjustment of disputes, only the more important disputes, which either directly endanger the peace or can in time do so, will be considered in that connexion. Smaller disputes, particularly such as are of a strictly legal nature without a political background, can practically not be considered in connexion with procedural settlement. Accordingly each state will, in the case of arbitration, be ready to pay a much bigger sum, if by the establishment of an arbitration court it can avoid a war. For such cases a special arbitration court is not too expensive. Lammasch justly observes that a few shots from a modern battery cost quite as much. As a matter of fact the states are at liberty to be represented before the tribunal by state officials ; the expense of the Bureau is borne by the nations as a body, and there remains only the expense of the judges. All this is worth while in the case of more or less significant disputes, but not in the case of smaller differences which arise quite frequently between states. In this case an arbitration court constituted for each case is too costly, and states must forego on that account the development of international law which would result from a legal settlement of these disputes. Each arbitration court costs a few thousand marks, and this amount of money is often out of all proportion to the importance of the object of the dispute, however great benefit the community of states might obtain from the legal settlement of these differences. Asser's just remarks, in 1907, with regard to the Permanent Court of Arbitration, are well known: 'It is difficult, time-

consuming, and costly to set it in motion.'[1] We need, therefore, a permanent court before which so many disputes will be brought for decision that the cost of each individual case will be trifling.

Moreover, such a division of the expense among the states as a body is more in accord with justice. Each state profits from the award of an international court, even though it is not itself a party to the case. It knows for the future how it must regulate its conduct legally. The international court of justice will furnish the governments of the individual states with valuable principles of conduct and contribute to the avoidance of war, both matters in which those states also which are not parties to the dispute are greatly concerned. Accordingly, the community of states must also pay the cost.

It must not be thought that individual states would suffer through this division of the total expenses, in that certain governments might perhaps make more frequent use of the court of justice at the expense of the other states, so that the total expense would grow and the share falling to each state would be greater. Such a frequent resort to the court of justice would only have the effect of inducing the other states to refer still more disputes to the court on their own part. Moreover, the fact that after all the states as a body benefit by a decision makes it a matter of indifference whether some states resort to the court more than others. Besides, it is evident that the smaller states will have a much smaller share of the cost to pay, as is the case already in the system of apportionment adopted by the Universal Postal Union.

If then the cost of the settlement of one of the numerous

[1] Of the same view were Choate (p. 311), Martens (p. 322), Marschall (p. 594), as well as Schücking (op. cit.).

legal disputes between states under the new procedure will be considerably less than formerly—indeed the trifling sum makes possible for the first time a legal decision—the total contribution of the individual states will indeed not be high in comparison with the valuable services of the new court of justice for the development of international law.

The expenses of the Permanent Bureau of the Hague Arbitration Court of 1899 amounted, for the whole body of states,

| | | | |
|---|---|---|---|
| In the year | 1900, | to 42,499 | gulden |
| ,, | 1901, | ,, 30,438 | ,, |
| ,, | 1902, | ,, 28,768 | ,, |
| ,, | 1903, | ,, 25,917 | ,, |
| ,, | 1904, | ,, 24,514 | ,, |
| ,, | 1905, | ,, 28,201 | ,, |
| ,, | 1906, | ,, 26,011 | ,, |
| ,, | 1907, | ,, 27,801 | ,, |
| ,, | 1908, | ,, 28,651 | ,, |
| ,, | 1909, | ,, 28,832 | ,, |

The individual states had approximately the following sums to pay for the International Bureau in 1910:

| | | |
|---|---|---|
| Germany, Austria-Hungary, China, United States, France, England, Italy, Japan, Russia, Turkey (each 25/375) . . | 1,514 | gulden |
| Spain (20/375) . . . . . | 1,211 | ,, |
| Belgium, Roumania, Holland, Sweden, Brazil, Switzerland (each 15/375) . | 908 | ,, |
| Denmark, Norway, Portugal (each 10/375) | 605 | ,, |
| Bulgaria, Greece, Mexico, Serbia, Argentine, Chile, Columbia, Peru (each 5/375) . . . . . | 302 | ,, |
| Luxemburg, Siam, Bolivia, Cuba, San Domingo, Ecuador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Persia, Uruguay, Venezuela, San Salvador (each 3/375) . . . . . | 181 | ,, |
| Montenegro (1/375) . . . . | 60 | ,, |

Let us estimate that the new court will have fifteen judges with a yearly salary of 6,000 gulden. If we assume that the judges will be kept busy for ten months continuously, so that each judge, in addition to the yearly salary of 6,000 gulden, will receive a compensation [1] of 100 gulden for each 300 days, the cost of the permanent court will amount to a total of 15 (6,000 + 100 × 300) gulden, or 540,000 gulden. Accordingly the share falling to each individual state would be after this method about twenty times as great as the present contribution to the expenses of the International Bureau. For example, Germany would pay 50,000 marks instead of 2,500, and Montenegro 2,000 marks instead of 100. Are these not trifling sums in comparison with those which are expended at the present day upon armaments ? The present contribution of many states to the International Bureau is in fact smaller than the allowance granted by them to the Interparliamentary Union or to the Berne Peace Bureau. Have the great powers not 50,000 marks, and the medium-sized and smaller states, say, 30,000 marks to spare for an international court of justice ? There can hardly be any doubt that they have. With such a court the states would above all have an excellent opportunity of having even the smallest differences settled promptly and of thereby developing international law at the same time. If the international decisions of the highest court have cleared up important questions, will not the expense of international conferences be saved, since they will need to meet for a much shorter time ?

Richet [2] estimates the cost of a permanent court of

[1] This daily compensation is provided for in the project of the Judicial Arbitration Court. In truth, it would be better to do away with it altogether and settle upon a fixed sum of, say, 20,000 gulden.

[2] p. 250.

justice at about six to seven million francs a year. This sum is too high, since Richet assumes that as many as one hundred judges, with a salary of 50,000 francs each, will officiate. There is no reason, of course, why the pay of the judges should not later on reach such an amount. But that time is still far off.

Moreover, the cost of counsel would fall considerably in the case of a truly permanent court. For the attorneys in permanent residence at The Hague would certainly not demand such huge honoraria for each case as most agents and counsel do at the present time.

At the first American National Peace Congress of 1907 [1] Professor Moore, the celebrated author of the six-volume work upon international arbitration, stated that for a country which refers many cases to arbitration a permanent tribunal was cheaper:

> Since we began our national existence we alone have had with other powers more than sixty arbitrations; and I found that the total number of years during which these tribunals had sat was a hundred and twenty-five—more than the entire duration of our national existence since the formation of the Constitution. The excess of aggregate time is explained by the fact that now and then there were two or three tribunals in session at once. It is also to be observed that the total expense of all our tribunals . . . doubtless was greater, far greater, than would have been the cost of an actual court always in session.

If, therefore, in the case of international arbitration it is true that the cost of a permanent court is smaller in case the number of disputes comes up to a certain number, how much more must this be the case with an international judicial tribunal!

[1] *Proceedings of the National Arbitration and Peace Congress*, p. 417.

# CHAPTER VI

## THE PERMANENT INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL LAW

DOES an international court of justice contradict, as Barbosa [1] asserted in 1907, the 'essential principles of international law'? The assertion is often made that international arbitration is in harmony with the nature of international law, whereas judicial settlement runs counter to its fundamental principles. There are two particular errors in this connexion which make an understanding of the questions here under discussion unnecessarily difficult, namely, the common assertion that international arbitration is voluntary in character, whereas international judicial settlement presupposes force, and further, that, in contrast with a court of arbitration, a court of justice is a 'supranational court'. A third objection against judicial settlement is the unfounded assertion that an international court of justice constitutes merely the first step towards a federation of states, or that it is inconceivable without some such close organization between them.

### 1. INTERNATIONAL JUDICIAL SETTLEMENT AND THE ENFORCEMENT OF DECISIONS

The idea that an international court of justice naturally presupposes force, an executive power which when necessary ensures respect for the decision of the court, is quite intelligible. One has always in mind the organization of

[1] p. 703.

municipal courts which, to be sure, could not act without an attendant power of enforcing their decisions. But states as subjects of international law are very different in character from persons as subjects of national law. It cannot be too clearly pointed out that in international law we are dealing with some forty-five legal persons, whereas in municipal law, for example in the German Empire, we are dealing with more than sixty million legal persons. We cannot at the present time or in the near future succeed in persuading sixty million men, whose characters are so widely varied, that they must act only in a legal way. We cannot do so because the sixty million persons are not so dependent upon one another that an injury which *A* does to *B* will to-morrow react upon *A*. But the case is quite different with states, which recognize more and more that their community life must proceed according to legal principles, and that each state at the same time suffers vital injury when it wrongs any other state. To hold that the future of states will not be generally regulated by law, even without the existence of a compulsory power, is to despair of the great work of mankind and to deny the public facts which are evidence of a continually stronger development in this direction. Thus far all of the numerous arbitral awards have been voluntarily carried out.[1]

Accordingly, there is no need for an executive power in international law, so that the ideal of an international court of justice does not require the accompaniment of force. To those who cannot free themselves from national views, and who understand by a court of justice in international law only a body of officers possessing the power of compulsion, there is under the present conditions of

[1] See, in addition, my commentary upon the Convention for the pacific settlement of international disputes, pp. 52 et seq.

international life really no such thing as international judicial settlement. But the representatives of this theory have not yet proved that judicial settlement between states is identical with judicial settlement within the state, so that a power of enforcement must be demanded as an abstract condition of judicial settlement between states. In the discussion of the concepts ' arbitration ' and ' judicial settlement ' in international life it is entirely wrong to take any other point of view than that of existing international law and, without taking into account its peculiar character, to introduce into international law the idea of judicial settlement within the state. That was done some years ago, particularly by Bluntschli, Lorimer, Fiore, Dudley Field and Mérignhac, and recently in particular by Pohl. At the Second Hague Peace Conference it was likewise asserted by a number of speakers that an international court of justice without the power of enforcing its decrees was inconceivable. Barbosa in particular confused the question when he said that the necessary consequence of the erection of the ' court of arbitral justice ' would be the creation of an executive power.[1] The same opinion was expressed on another occasion by Ordoñez.[2]

It is true that Barbosa and Ordoñez had as an excuse for their mistaken views the fact that the American Ambassador Choate, in laying down the basis of his project, let fall certain words which could only too easily be misunderstood. He cited[3] the words of Roosevelt in a letter to Carnegie in which the wish was expressed that ' in each case that may come before them [the judges], they will decide between the nations, great or small, exactly as a judge within our own limits decides between the individuals, great or small, who come before him '. The mistaken conclusion could

[1] p. 659. [2] p. 156. [3] p. 309.

have been drawn from these words that later on in the case of judicial settlement between states—as a close comparison was made in that letter between it and judicial settlement within a state—an executive power was to be introduced, especially since Carnegie, to whom the letter was addressed, was known to be an ardent advocate of forcible execution by the international court. But that was not the meaning of Choate's words. We see this when we consider the basic principles of the American Society for the Judicial Settlement of International Disputes, founded by James Brown Scott, who is of the same mind as Choate. In the programme of this society printed at the end of Baldwin's pamphlet *The New Era of International Courts*, it is said *inter alia*: 'The purpose underlying the formation of the American Society for Judicial Settlement of International Disputes is promotion of the project to establish a judicial tribunal which will do for the civilized world what the ordinary courts of justice do for the individual.' It is perfectly clear from the numerous addresses made at the first yearly meeting of this society (e.g., that of Macfarland) [1] and from the plans which I have before me of the founder and president of the society, Scott, that this new world court will rely merely upon public opinion for the enforcement of its decrees, and that it will justly observe in the exercise of its activity the marked distinction between the legal subjects of municipal and those of international law. These facts clearly show that Choate had no intention of pushing the analogy between national and international courts as far as it is frequently and mistakenly done. Had he foreseen that Barbosa and others would only be further led astray by his comparison, he would certainly have omitted it. For when Barbosa [2] said that 'the

[1] *Proceedings*, p. 166.

[2] p. 341.

judicial settlement of disputes between states cannot be carried out in the same way in which disputes between individuals are settled', he had another idea in mind than the comparison made by Choate.

It is true that of late the movement to create an international authority to enforce decisions has, in consequence of the efforts of van Vollenhoven, unfortunately obtained influence.[1] Foulke[2] also declared in 1911, at the Lake Mohonk Conference, that a power of enforcement was desirable, although Tripp[3] at the meeting of the same body held four years earlier vigorously attacked this proposal.

## 2. International Judicial Settlement and the Sovereignty of States

A second assertion which makes an understanding upon the question of international judicial settlement and arbitration very difficult is based upon the belief that arbitration rests upon the consent of the parties, whereas judicial settlement presupposes a higher authority. As a matter of fact international judicial settlement is as much in keeping with present international law as is international arbitration. Both institutions rest upon the consent of the parties, and arbitral courts as well as courts of justice are both supra-national organs.[4] The sole difference is that in the one case the will of the parties is more strongly obligated than in the other. I do not understand how

[1] See in particular the collected opinions in the volume *In't Zicht der derde Vredesconferentie*, 1911; also den Beer Poortugael, *Le Droit des gens en marche vers la paix*, 1912.

[2] Report, p. 99.

[3] Report, 1907, pp. 49 et seq.

[4] Kohler, in *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1912, p. 106, is of the same opinion; Pohl, op. cit., pp. 193 et seq., is of the opposite opinion.

those who think that international arbitration in contrast with the international court of justice is not a supra-national organ mean to classify the various intermediate stages between international judicial settlement and arbitration, whether in these cases they would say that there was a supra-national authority or not. We may distinguish the following steps in the development of arbitration into judicial settlement:

1. The free choice of the arbitrators and the reference of the dispute to a court in accordance with a special *compromis*.
2. The free choice of the arbitrators and the reference of the dispute to a court in virtue of a general arbitration treaty.
3. The reference of the dispute to a permanent court in accordance with a special *compromis*.
4. The reference of the dispute to a permanent court in accordance with a general treaty of arbitration.
5. The unilateral institution of an action by the parties before a permanent court of justice.

If we consider now the above-mentioned five cases there can be no doubt that the only difference between them consists in the degree of legal obligation. The foundations of international law will not be shaken any the more whether two states refer a definite case to an arbitration court yet to be constituted, or whether the community of states establishes once for all a court of justice for the settlement of certain disputes, before which each state can by its own motion institute an action.[1] In any case, however, a state can in fact only be condemned with its express consent, whether this be granted in general or in each special case. It must be further observed that a judgment by default is not possible, and the objection can

[1] See in this connexion Hold von Ferneck in *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1912, pp. 16 et seq.

always be raised that honour and vital interests are involved. Accordingly, even in the case of a general obligation, it is only possible for a state to be condemned when it appears in person before the court, and thereby makes it clear a second time that it gives its assent to a settlement by legal proceedings. The foundations of international law would not be altered unless an international court of justice were set up by an organ exercising authority over the states. A sharp distinction must be made between a supra-national court set up with the consent of states and a tribunal imposed upon states by a higher authority.

Is there any great difference whether in the one case the judges are appointed only after a dispute has arisen between the parties or are appointed in advance by the community of states? Does not the individual state also co-operate directly or indirectly in the latter case in the appointment of the body of judges, whether by taking part in the appointment of the judges, or, in case the selection is entrusted to other organs, by ratifying the convention and thus delegating others to appoint the judges?

How far the states are willing to obligate themselves legally depends above all upon the community of interests between them. The greater the number of disputes which arise between states the greater the necessity there will be no longer to conclude at every turn special arbitration agreements, but to bring into existence an institution which works as it were automatically.

Undoubtedly, a state will be more and more obligated as arbitration develops into a regular judicial system, and the authority of the body placed over the states will become constantly greater, especially as the states will confer more and more jurisdiction upon it. In the first world arbitration treaty (later on the better name will

be,—a treaty concerning the jurisdiction of the international court of justice) very few disputes will be entrusted to it; but the number will gradually become greater and greater. But there can be no doubt that the most significant restriction of the sovereignty of states did not come about on the day when, in the form of an International Prize Court, there was created for the first time a sort of international court of justice, but at the time when for the first time disputes were no longer without exception settled by virtue of the state's own sovereign judgment with its final appeal to the sword, but were referred to a third party as arbitrator for a settlement in accordance with international law. This transition was just as gradual as the development of international arbitration into judicial settlement, which is taking place to-day before our very eyes. It cannot of course be said that the transition began thousands of years ago, when the first isolated arbitration awards were rendered. For at that time there was no community of interests, and in consequence no international law. When three hundred years before Christ five Rhodian judges rendered a decision in a boundary dispute between Samos and Priene, there existed no guarantee that the decision would be carried out. Both parties waited to learn what the arbitration award was to be, and if it did not suit them they did not carry it out. If, however, the losing party fulfilled the obligation assumed by the arbitration treaty, it did so not out of respect for international law, but out of a fear of the punishment of the gods, who would avenge the violation of an oath, or out of fear of its more powerful opponent. In the Middle Ages as well the parties, in entering into an arbitration treaty, were scarcely acknowledging the authority of international law, as they undoubtedly do at the present day.

At best the princes had recourse to the pope, as the pope stood above the nations and no one dared defy his award. But in so doing princes were in every case yielding to the authority of the pope, not to that of international law. Accordingly, as the papal power weakened the arbitral activity of the popes likewise ceased, and arbitration only came again into favour when the foundations of international law were gradually laid. To be sure, arbitral awards were rendered also by legal bodies and by other isolated individuals. But the question was always one of disposing of the disputes by mediation, as is seen in the fact that the arbitrators of the Middle Ages often spoke of themselves as 'friendly compositors'. States did not wish to go to war for such trifles, and endeavoured to dispose of them in any manner at all. But in so doing they did not recognize the authority of international law before which it was their duty to bow. Indeed, when at last with the beginning of the nineteenth century numerous arbitration treaties were entered into merely with the object of giving the parties their rights, the arbitrators could not immediately get accustomed to this new rôle in which they were to be actual judges. The submission of the parties to a higher power, international law, appeared to them so serious a limitation of sovereignty, that they at most felt called upon under commission of the parties only to dispose of the dispute in the fairest manner, not to expound international law.

As soon, however, as this has once been recognized, it is thereupon evident that with respect to the question of the limitation of sovereignty it is incorrect to make a distinction whether the arbitrators, that is the judges, are appointed once for all or are chosen anew in each individual case, whether a unilateral right of action exists or a *compromis*

is necessary. The fundamental point is merely the fact that the state bows its will to the authority of international law. What persons or what bodies are the exponents of this international law is indeed highly significant as a practical matter, but is of no importance for the legal aspect of the question.

These facts were for a long time unknown, and thus it happened that the establishment of the International Prize Court, which lies entirely in the line of development, was attributed too prominent significance. Pohl [1] and Schücking [2] are right in not assigning to the International Prize Court an essentially different legal character from that of a special arbitration court.

Von Liszt [3] puts the question differently in his treatise *Das Wesen des völkerrechtlichen Staatenverbandes und der internationale Prisenhof.*[4] He thinks that 'as a matter of fact it cannot be denied that the establishment of a permanent court of justice having jurisdiction independently of the consent of the parties involves an encroachment upon the sovereignty of states, and consequently an alteration of the foundations of international law', whereas I am of the opinion that the encroachment upon the sovereignty of states began much earlier with the authority of international law. It is merely that this fact has been brought to the knowledge of the public in consequence of the erection of the Prize Court, which is a particularly clear manifestation of that change. And if von Liszt sees in the composition of the Prize Court an alteration of the foundations of international law, I for my part regard the grouping of states in that Convention as so unusual that no further

[1] Op. cit.
[2] Op. cit., pp. 119 et seq.
[3] See also Flourens in *Deutsche Revue*, April, 1912, pp. 85 et seq.
[4] pp. 11 et seq.

consequences can be attached to it. The vigorous opposition of the states to the composition of the Judicial Arbitration Court according to the system of rotation is the best sign that the establishment of an international court of justice will never take place with such disregard for the smaller states. That the position held by the judges of the Prize Court and their international oath are not in contradiction to international law also seems to me self-evident. For arbitrators have been before the present day international judges, not mere representatives of their states, and have also in previous times taken an international oath before entering upon their office.[1]

On the contrary, I agree with Nippold [2] when he thinks that the chief and most significant progress resulting from the creation of the International Prize Court consists in the organization of an international judiciary. This view is justified by the simple fact that a healthy development of international law can for the most part take place only gradually, and accordingly an international permanent court of justice, if it signified a complete setting aside of international law, could hardly be recommended.

The chief significance of the International Prize Court, in addition to the creation of a permanent judicial organization, consists in the clear recognition of the principle that 'international law is superior to national law', and in the exceedingly wide substantive jurisdiction of the court.

But it will now be asked why I speak of the Judicial

[1] See in addition the excellent remarks of Schücking, op. cit., pp. 117 et seq., with which I am for the most part in accord. A right of denunciation on the part of states seems to me of no consequence at all as regards the legal constitution of the Judicial Arbitration Court. Would not something have to be put in its place if this right were renounced?

[2] *Die zweite Haager Konferenz*, p. 185.

Arbitration Court and the Prize Court as judicial institutions, when both depend upon the consent of the parties in the same way as the separately constituted arbitration courts. On this point I have the following remarks to make: the most important distinction between judicial settlement and arbitration in *national* law is to be found in the fact that judicial settlement is carried out by a legal authority placed over the individual persons, namely, the state, whereas, on the contrary, arbitration rests upon the consent of the parties. Now in *international* law a judicial institution set up by one having legal authority over the states cannot be considered. Every legal decision must in the abstract rest upon the free consent of the states. If a court of justice were set up over states by a superior body we should then have a world federal state. This court of justice would be, therefore, not an international institution but a national one. The concept 'judicial settlement' must be taken in such a sense that it can be realized within the present international community. But there can be no question of that if the national idea of judicial settlement is without any change transferred into international law.

It follows therefore that the idea of judicial settlement must be given a different meaning in international law from that which it has in national law. Here I am in disagreement with Pohl [1] and Schücking.[2] By courts of justice in international law I understand those agencies which are set up for the strictly legal settlement of international disputes, and are permanently adapted to the purpose. In contrast to these courts are arbitral courts which merely have in view a disposal of the case on the basis of equity. Whether there is or is not behind these

[1] Op. cit., p. 195. [2] Op. cit., p. 124.

courts a power to enforce their decrees seems to me to be of no consequence. For I hold, as was shown above, that such a power of enforcement in international law is in no case necessary.

If Schücking's definition were accepted and if the Prize Court and the Judicial Arbitration Court were characterized as arbitration courts, the great contrast between arbitration courts, which are set up as the occasion calls for them, and completely organized courts, which are appointed to expound international law in a systematic way, would be entirely obliterated. On the contrary, it must be recognized that there exists a sharp distinction in the judicial organization and in the purposes of these two forms of procedure for the settlement of differences, and that this distinction should also appear in the names given them. Schücking's definition is merely negative: 'The Prize Court and the Judicial Arbitration Court are not courts of justice in the municipal sense but rest entirely upon arbitral foundations, if the municipal idea of arbitration be taken as a basis.' That is without doubt correct. But it is not enough to say what those institutions are according to a standard borrowed from municipal law and not at all suited to international law; we must approach them from a new, strictly international point of view. Why should we not introduce into international law the terms 'judicial settlement' and 'arbitration' to distinguish the two chief methods of procedure for the settlement of disputes, provided that in so doing we keep before our eyes that by international judicial settlement we understand something quite different from judicial settlement in municipal law? Certainly two other terms would perhaps better prevent a confusion of municipal and international concepts. But the distinction which I advocate is made use of in so many quarters, and

the terms arbitration and judicial settlement are so current throughout the world, that more appropriate names cannot be found. Distinguished authors, such as Hold von Ferneck,[1] Huber,[2] Nippold,[3] Kohler,[4] Despagnet,[5] Davis,[6] Oppenheim,[7] von Liszt,[8] Fried,[9] and in the beginning Zorn[10] also, have spoken of the Prize Court, which is identical in principle with the Judicial Arbitration Court, as a true judicial court. Moreover, in the proceedings of the Second Hague Conference a group of delegates referred to the Judicial Arbitration Court and the Prize Court as judicial courts. Further, it seems to me worthy of remark that the numerous Americans of recognized standing who support the project of the Judicial Arbitration Court, and Scott in particular, not only in their addresses and writings speak of a 'court of justice', but have given to the society which they have formed the name 'American Society for the *Judicial* Settlement of International Disputes'. On the other hand, those who see in the Court of Arbitral Justice an arbitration court stand apart by themselves. I mention in addition Schücking, Pohl, Bustamante, Lammasch, de Louter, and von Ullmann.

The terminology proposed by me is, moreover, highly commendable for the further reason that in municipal law judicial settlement furnishes us with a strictly legal decision, whereas arbitration furnishes us with a decision in accordance with equity. Accordingly, the distinction between judicial settlement and arbitration in international law is

[1] Op. cit., pp. 13 et seq.
[2] Op. cit., p. 472.
[3] *Haager Friedenskonferenz*, vol. i, p. 185.
[4] *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, vol. vi, p. 108.
[5] *Droit international public*, p. 1359.
[6] *Elements of International Law*, p. 262.
[7] Op. cit., pp. 43 et seq.
[8] *Völkerrecht*, p. 277.
[9] *Die zweite Haager Konferenz*, p. 185.
[10] *Festgabe für Laband*, pp. 179, 180.

analogous to the corresponding distinction in municipal law, even if on important points the above-mentioned differences exist.

As regards the names of the Judicial Arbitration Court and the Prize Court, I have, however, the following remarks to make:

With respect to those who have only a superior contempt for the remarkable progress of international law, and also of the peace movement which in recent years has been the result of it, and who fail to appreciate the high idealism based upon actual facts which exists in the world of pacifism,—with respect to these sceptics I assert that the splendid progress which is involved in the Judicial Arbitration Court, adopted in principle by the Second Peace Conference, and in the Prize Court, cannot be too strongly emphasized. Those who are always insisting that the occasional and the permanent agencies for the settlement of international disputes are identical, and are 'only' arbitration courts, seek to create the impression in the minds of the present generation, or create it unconsciously, that these permanent institutions signify at bottom no progress, and they depreciate the great value of the new project in the eyes of a public which has for a long time failed to recognize the true significance of the great Hague Peace Conferences. For when it is said that 'the International Prize Court and the Judicial Arbitration Court are not judicial courts', it is thereby directly asserted that there is a still higher stage in the procedural settlement of international disputes, and that a tribunal set up by a higher authority is after all conceivable in international law, and that the highest form of an international court has not yet been reached by far. But in truth a supranational court, in the sense that it derives its power from

an authority higher than that of the states, is simply inconceivable under the system of international law; and the Judicial Arbitration Court and the Prize Court in their main elements (prescinding from details) [1] are indeed the highest form of possible institutions for the peaceful settlement of international disputes. Accordingly, in using the name 'court of justice' we at the same time publish to the world the splendid progress of the new organization of nations. To this end all those must co-operate who are of the belief that the true science of international law has not merely as its aim to define legal concepts in a clear and precise manner, but that it must co-operate with the strength and enthusiasm of the true disciples of international law in the reform of international anarchy, and that it must devote itself to the great questions of actual life (not those of the study room) with that same zeal of which the pacifists are continually giving us an example. That is indeed the critical question which we German international law jurists must face: Shall we, with Kohler, von Liszt, von Ullmann, Niemeyer, Lammasch, Schücking and others, agree to recognize that the fundamental idea of the peace movement is entirely sound, or shall we continue to stand in the way of a development which is fraught with such great blessings for mankind? Shall we not rather, before we reject the proposals of the pacifists with a superior disdain, give ourselves up to long and earnest study of history and of doctrine, in order to comprehend that great world of ideas?

Accordingly, the contest over the terms 'arbitration' or 'judicial settlement' is in my mind not merely a verbal dispute but a fundamental question. Precisely because of the significance of pacifism, to make known the positive

[1] See below.

foundations of which is my highest endeavour, we should not fear to call things by their right names.

And now in conclusion let us read the statements made by Barbosa [1] at the sixth meeting of the committee appointed by the Second Hague Peace Conference to consider the Judicial Arbitration Court:

> Judicial settlement and arbitration are ultimately reducible to one and the same idea, that of the recognition of right between two opposing claims. The arbitrators decide; they do justice; their decisions bear the name of awards. These are the elementary ideas with which every one is familiar. Nevertheless, in spite of this fact there is from a juristic point of view so real a distinction between the office of judge and that of arbitrator that the two will never be confounded without introducing uncertainty and confusion into the principles which are most necessary to the organization of judicial institutions and methods of procedure.
>
> Observe the laws of all countries. They prescribe judicial institutions. They authorize arbitration. The two institutions live side by side, mutually aid each other, replace each other, intertwine at times, but never destroy or become confounded with each other. This fact proves the fundamental difference between them and at the same time the necessity of their parallel activities; for if they were substantially identical the contact between them would have resulted in their being confounded with the other and they would not have continued to be employed for thousands of years as distinct agencies.
>
> Hence courts of justice and arbitral tribunals are both indispensable. The existence of each is justified and they have separate functions and a distinct character. In what do they differ? First of all, as to the source from which they are derived; next, as to the social principle which animates them; lastly, as to the juridical form in which they are clothed.
>
> In the case of the courts of justice the juridical form

[1] p. 659.

> of the court is permanent and unalterable. It is fixed by law. In the case of arbitral tribunals the juridical procedure is variable and determined by the circumstances. It depends upon an agreement of the parties. Courts of justice proceed from sovereignty and are imposed upon an obedient people. Its agencies are created by the power of states. The parties are constrained to submit to them. On the contrary, arbitral courts are based upon free choice and are the result of a convention. They have no greater authority than that given them by the contracting parties, and their judges are such as are voluntarily appointed by the parties. It is for this reason that while courts of justice are preferable for the settlement of the relations between individuals, courts of arbitration are the only ones possible between nations. The latter submit only to the authorities which they have themselves created. To substitute courts of justice for those of arbitration would be in the case of nations to replace voluntary consent by constraint.

How appropriate were these words of Barbosa in 1907, when it was sought to introduce an international judicial system not based in fact upon the free consent of the states, but imposed by a higher power! But how mistaken Barbosa's remarks appear to be when one keeps in mind that the Judicial Arbitration Court of the Second Peace Conference, measured by the standard of national law, was only a truly permanent arbitration court! Barbosa overlooked the distinction between national and international judicial institutions. He took offence at the term 'court of justice', and thought that an institution bearing that name must necessarily rest upon the same foundations in international law as in national law. It seems to me, indeed, most remarkable that none of the delegates fully cleared up Barbosa's error.

### 3. International Judicial Settlement and World Federation

Finally, there remains to be disproved the assertion that the erection of an international court of justice would be the preliminary step to a federation of states.

Barbosa's statements at the Second Hague Conference [1] in this connexion were incorrect: 'A further step forward and there will be established an international executive as a preliminary to a universal legislature. It will be the Constitution of the United States of the World.'

The union of the community of states upon an international basis came about so unexpectedly that for a long time men could not formulate it in legal terms. Just as the jurists of private law brought false views into the field of public law, so the public law jurists confused the fundamental principles of international law with concepts derived from public law but not suited to international law. Many of them saw with dread in the ever-growing community of states the approach of a world federation. And yet nothing could be more absurd than this view. When the German Empire was a federal state it was necessary to unite the individual small states, so that a single, noble, self-conscious legal authority took the place of many small states. The individual states were at that time all German. They all wanted to stand as a powerful unit against foreign enemies. But the condition of similarity of race does not hold good in the case of the states of the world. Moreover, the states of the world are not under the necessity of arming themselves against a foreign foe. Accordingly, everything argues against a development in the direction of a world federation. It is unintelligible, therefore, why persons should regard

[1] p. 659.

the ever-growing union of states as the beginning of the development of a world federation.

In particular is it absurd to maintain that a world court of justice is only possible in the world federation of states desired by Utopian dreamers, because otherwise the decisions of the court of justice would not be executed. It has been pointed out above that the judicial settlement of international disputes is possible even without the power of enforcement possessed by a federal state.

Having thus shown that an international permanent court of justice is entirely consistent with the nature of international law, we dispose of the opinion of Zorn[1] that the old Arbitration Court of 1899 is more in keeping with international law than the project of the Second Hague Conference concerning a Judicial Arbitration Court. For the idea of the international court of justice, the establishment of which is an absolute necessity, does indeed imply a closer union of the states than is the case with arbitration, but this union is after all only one which is intimately bound up with the interests of all the members of the community of states.

If a clear grasp be had of the significance of judicial settlement under the system of international law, it will be possible to understand the meaning of the conflict at the Second Hague Peace Conference concerning the name of the truly permanent tribunal. This conflict, of which I shall speak in the following section, would not have been possible if the distinction between judicial settlement in national and judicial settlement in international law had been clearly understood.

[1] *Zeitschrift für Politik*, vol. ii, p. 351.

### 4. The Name of the New Court of Justice

The first name proposed in 1907 for the permanent court of justice was the 'International High Court of Justice'. As was pointed out by Scott in his report,[1] the authors of this proposal wished by that name to bring out the idea 'that the court would be an international court and that it would have for its object the settlement of all disputes whatever which might be submitted to it in a spirit dominated by the sense of judicial responsibility which is peculiar to courts of justice'.

This was opposed first of all by Lammasch,[2] who observed that if the court bore that name persons might obtain the idea that the new tribunal was merely a court of appeal. He further expressed the opinion that if the court were so named the impression would be given that it was the intention to substitute judicial settlement in place of arbitration. Barbosa[3] naturally agreed with him fully upon both points. Asser and Renault[3] also feared that the proposed name might give rise to the idea that the court was a court of appeal. In answer to this Fry[4] explained (and in my opinion he was right) that in England the term 'High Court' signified not necessarily a court of appeal, but only a court of justice of first instance for certain disputes of a particularly important significance. 'The term High Court', he insisted, 'signifies not only a court of appeal, but also a court for important cases.' Baron Marschall[3] also failed to see that the expression 'International Court of Justice' would give occasion to misunderstandings.

After these proceedings in committee *B* of the first sub-

[1] Vol. i, p. 355.
[2] pp. 596, 597.
[3] p. 597.
[4] Op. cit.

commission of the first commission, a drafting committee was appointed consisting of Lammasch, Asser, Renault, Crowe, Kriege, and Scott. This committee decided to retain the term 'International Court of Justice' for the very good reason that the question at issue was that of international judicial settlement. At the next meeting Lammasch [1] opposed the resolution of the majority of this committee. He expressed the fear that if the court bore that name the appearance might be given that the court was composed of judges having authority over the states. He advocated the name 'International Court of Arbitral Justice'. Scott, Renault, and Fry [1] were opposed to this. Mérey [2] brought forward two arguments in support of the proposal of his countryman, Lammasch—the first being that, in his view, the old and the new court had the same 'arbitral mission' (in which idea he was mistaken), and the second that he had been convinced from the preceding discussions that if the word 'arbitral' were stricken out it would be equivalent to a denial of the arbitral character of the new tribunal. Here again Mérey was wrong in thinking that the whole nature of an institution could be changed by giving it another name. He proposed instead of 'Court of Arbitral Justice' the name 'Court of Arbitral Jurisdiction'. To this proposal Lammasch [3] also gave his adherence at the next meeting.

Those who wished to see the judicial functions of the new tribunal expressed in its name yielded finally to those who held out for the alleged arbitral activity of the new court. Scott [3] also was weary of the dispute over a word. The important thing was the principle at issue, and this was not hurt by giving the new tribunal the inappropriate name of an arbitral court. The name 'Court of Arbitral Justice'

[1] p. 658. [2] p. 660. [3] p. 681.

was thereupon adopted, after Bourgeois [1] had remarked very appropriately that 'the word "justice" indicates the end which we seek more and more to attain; the primary question will not be to weigh interests, but to do justice. On the other hand, the word "arbitral" stands for the free and independent consent of the parties.'

It is first of all remarkable that the name 'Court of Arbitral Justice' (the word 'international' in the title was struck out as being too awkward) does not express the fact that the Court of Justice is a permanent one. Asser [2] and Fusinato [1] had proposed to take away the adjective 'permanent' from the Permanent Court of 1899, and to affix it to the name of the new court of justice. But on this question there was so little agreement that it was doubtful whether the new tribunal would actually come into existence. Accordingly it seemed unwise to alter the name by which the old Arbitration Court was known throughout the whole world.

There is no need to emphasize further the fact that the name 'Court of Arbitral Justice' is not a particularly appropriate one. The term 'International Court of Justice' which was first proposed would have been much more in keeping with the nature of the institution. That was pointed out in particular by Jarousse de Sillac,[3] who very justly remarked 'the word "arbitral" implies the idea that the arbitrators are chosen for each dispute which arises, and that their powers expire with the settlement of it'.[4]

[1] p. 682. [2] pp. 597, 682. [3] p. 456.

[4] TRANSLATOR'S NOTE. The French title *Cour de Justice Arbitral* has been rendered 'Judicial Arbitration Court' in the official translations of the United States and Great Britain, and that designation has therefore been employed in other parts of this work as a substitute for the unofficial title 'Court of Arbitral Justice' still in use.

## CHAPTER VII

### THE EFFORTS THUS FAR MADE FOR THE ESTABLISHMENT OF A PERMANENT COURT OF JUSTICE

At the present day, when the development of international arbitration into judicial settlement appears assured, it is of particular interest to glance back at the numerous efforts made during the last decades for the creation of an international court. In so doing I shall omit the earliest projects, which have essentially only a historical value, as well as those which at the same time advocate a world federation, a European federation, &c.

### 1. The Projects of Individual Persons

Until recent years all the authorities have regarded arbitration more or less exclusively as a means for the settlement of disputes. Bentham crudely expressed the theory of the settlement of disputes as follows: 'Just or unjust, the award of an arbitral tribunal will save the credit and honour of the losing state.' Accordingly, the court advocated by these authors is merely an instrument of peace and not of law. This idea is particularly prominent in the 'draft' project for the creation of an international council and high court of arbitration' drawn up by Levi in 1887, and warmly recommended by the Universal Peace Congress at Paris in 1889. This project advocated the creation of an 'international council of arbitration', which was to settle disputes between the parties by means of mediation and other such measures. In case a dispute

was to be settled by arbitration, the council was to appoint from among its members a 'high court of international arbitration'. Provisions of that kind by which a dispute was to be in any case settled by mediation, and only in an extreme case was to be referred to an arbitration court, are just as unsuited to the legal settlement of the greatest possible number of cases as is the commission of inquiry in the new arbitration treaty between Great Britain and the United States, of which we shall speak later.

The projects of Dudley Field and Saint-Georges d'Armstrong, which are quite similar, can just as little be regarded as models. Dudley Field desired a permanent court of arbitration, whose members were to be appointed by the parties in each case. This 'Joint High Commission' was to act as far as possible as mediator in the dispute. A court of appeal was then to be constituted of judges who were to be proposed by the neutral states. The parties were to have a limited right of challenge with regard to the judges of the court of appeal. According to the project of Saint-Georges d'Armstrong, the parties were in like manner to have complete freedom in the choice of the judges of the court of first instance, but were to have only a limited right of challenge with respect to the judges of the arbitral court of appeal, who were to be appointed from some impartial quarter. Both projects, which look to the erection of a permanent tribunal only as a court of appeal, rest upon a false basis. The distinguished character of most judges makes a revision of the decision so infrequent that international law could not be developed as it should by such a court of appeal. Accordingly, both projects were drawn up merely with the object of disposing of disputes.

Ladd, the founder of the American Peace Society, comes much nearer to our idea of legal decisions; he started out

with the principle that the chief duty of an international permanent court was to expound international law, and accordingly substantive international law must first of all be defined and codified through the agency of a congress. At the same time a permanent tribunal, upon which each state was to name two judges, was to be established. In the period from 1835 to 1840 Ladd repeatedly presented petitions to the American Congress with this object in view, but met with no success. His ideas, which were taken up by Elihu Burritt, Miles, Sartorius, Larroque, Marcoartu, Bara, Pays and de Laveleye, and were represented in Germany in 1886 by the Darmstadt[1] Peace Union, do not take into consideration the fact that a general codification of international law is at present impossible and, accordingly, that the only method must be that of the gradual codification of international law by means of international conventions and the decisions of an international court. In addition, Dudley Field and Saint-Georges d'Armstrong had also advocated the codification of international law, but they did not make this a direct condition for the creation of an international court, as did the last-mentioned writers.

The projects presented by Count Kamarovski and his high-minded pupils, Mougins de Roquefort and Revon, stand upon a much higher plane. They desire an international court which would dispose of disputes according to law and equity. 'As a matter of fact,' says Mougins de Roquefort,[2] 'in international affairs arbitrators play very often the part of friendly compositors.' Accordingly, he wants a true court of justice. Nevertheless these writers practically fail to emphasize the development of inter-

[1] See Dietz, *Franz Wirth und der Frankfurter Friedensverein*, p. 22.

[2] p. 208.

national law as one of the duties of this court. It appeared perhaps self-evident to them. For a court which decides according to strict law must naturally render much more detailed decisions than an arbitration court which decides according to equity, and it would thereby of itself contribute to the development of international law. The project of a permanent tribunal as an organ of the law existing between states, which Schlief brings forward in his book *Der Friede in Europa*, is also well worthy of consideration.

Numerous projects proposed during those years, such as those of Adler, Lorimer, Gondon d'Assone, Saint-Simon, Pecqueur, Marchand, Villiaume, Trendelenburg, Sigaud, Ferrer, Dupasquier and Loewenthal, recommended an international congress, that is, an arbitration court with executive power. They belong more or less to the class of Utopian schemes. Side by side with these comprehensive projects there naturally arose others which show greater restraint and which endeavour above all to make it easier for states to take the first step towards a permanent court. Among these writers the first place is to be assigned without question to the Frenchman, Mérignhac. Mérignhac did not advocate a truly permanent court, but laid down similar principles to those which were later recognized by the First Hague Peace Conference.

Individual writers likewise presented restricted plans in advocating that the activity of the new court be limited at first to certain states. Thus de Laveleye proposed a court of justice between Great Britain and the United States, which was later on to extend its functions also to disputes arising between other nations.[1] Bentham, Schlief, and Stanhope (the latter at the meeting of the Interparlia-

[1] See also Report, 1898, p. 40.

mentary Union at The Hague in 1894) proposed a strictly European court. This idea of a court limited to certain groups of states was never abandoned, and at the Lake Mohonk Conference in 1901 certain speakers, in particular Baldwin, expressed the opinion that it would do no harm if the new court of justice did not come into use for all the states at the same time; it would then be at least, as in the case of the Central American Court of Justice, a step upon the way towards the great goal.

### 2. The Projects of International Unofficial Associations—Universal Peace Congresses, Interparliamentary Union, Institute of International Law, International Law Association

In the presence of so great a number of projects the international associations, which in the ten years preceding the First Hague Peace Conference occupied themselves with the plan of a permanent court of arbitration, found themselves in quite a difficult position. Stanhope [1] justly observed at the meeting of the Interparliamentary Union at The Hague that 'for one who desires to go into details of the constitution of a Central European court, it is difficult to choose among the thousand and one projects which for some years have appeared in the form of pamphlets or in the European press'.

The Universal Peace Congresses which began in 1889, occupied themselves almost every year down to 1895 with a careful consideration of the problem of an arbitration court. The Congress which met at Paris in 1889 advocated the above-mentioned project of Levi, as Darby also says in his *International Tribunals*.[2] This project met, to be

[1] *Conférence interparlementaire*, 1894, p. 225. [2] pp. 216 et seq.

sure, with little success. The Congress further expressed its conviction that the best preparation for the creation of a permanent court of arbitration would be for each state, when concluding a permanent treaty of arbitration, to designate the jurists who, in case a dispute should arise, were to be its representatives upon the tribunal. The project of Levi was approved in the report presented to the Universal Peace Congress of 1892 at Berne by Hodgson Pratt. Mazzoleni and Kolben made a motion at Berne that the Congress should declare it desirable that the Peace Congresses should yearly appoint from among their members and the members of the parliaments an arbitration court to which the states might refer their disputes. But the proposal received no support.[1]

At the Universal Peace Congress which met at Chicago in the following year, Butler, Eaton, and Brainerd presented an elaborate project advocating a permanent court of arbitration. This is also printed in Darby.[2] A list of judges already appears in this moderate proposal as the key-note of the new idea. At the Congress at Chicago a long and important discussion concerning the court of arbitration took place, which for scientific depth and political insight has been surpassed by the deliberations of no other body. A commission appointed by the Congress at Chicago made a report at the next Universal Peace Congress at Antwerp in 1894. This report is likewise based upon actual political facts, and is in no way Utopian in

[1] The French Peace Society, *La Paix par le Droit*, made a similar motion at the general meeting of the delegates of the Berne Peace Bureau in 1898 (Bulletin, pp. 13–19, 23), but after a detailed report of Dr. Richter (Pforzheim) it was set aside on the ground that no government would have its disputes decided by persons not possessing an official character.

[2] pp. 500 et seq.

character, as can best be seen from the following statements on page 5 of the report drawn up by La Fontaine:

> In fact there seems to exist a certain confusion in the ideas of the various jurists who have occupied themselves with this question. Some speak of a 'court of arbitration', others of an 'international tribunal'. They seem to think that they are both one and the same institution. That is, however, not the case. It was generally agreed that the 'court of arbitration' was to be made up of arbitrators who were to be appointed in advance by the several states, and that from among these the contending parties were to appoint the arbitrators who were to decide in a specific case. Such an arrangement would merely have the effect of limiting the choice of the several states; they could no longer appoint as arbitrator the man who approved himself to their judgment. The procedure was to be very simple, and similar to that worked out in the code proposed by us. On the other hand, the 'international tribunal' would exercise truly permanent judicial functions, similar to those of the ordinary courts of justice of the various countries, with the sole difference that instead of private persons states would bring suit before it. Such an organization is still in the distant future.

The Universal Peace Congress at Antwerp did not pass a definite resolution, but referred the question for further study to the Commission of the Berne Bureau for International Law.

Is not the fundamental principle upon which the Hague Court rests already expressed, though with a noticeable difference, in that report of the Congress at Antwerp? Unfortunately the material upon this subject is not easily accessible, so that it is quite intelligible how the historians of the Hague Conferences, in describing the history of the period preceding the adoption of the Hague Court of Arbitration, have failed thus far to point out the valuable

preliminary work of the Universal Peace Congresses. Of all the projects of the Congress at Antwerp, Hornby's report is the most deserving of consideration. For here we find for the first time a clear exposition of the ideas which Scott advocated at The Hague in 1907.

The Universal Peace Congress at Antwerp took place some days before the meeting of the Interparliamentary Union at The Hague. At the meeting of the Interparliamentary Union Stanhope (not only an interparliamentarian in the strict sense but a pacifist) arose and proposed [1] that the meeting take into consideration the problem of the permanent court of arbitration. But Tydeman, Marcoartu, and von Bar thereupon arose and asserted that the creation of an international court of arbitration would be worthless, unless the fundamental principles of international law were previously determined. On the other hand, Gobat vigorously supported Stanhope's motion, pointing out with justice that the codification of international law and the creation of an international court of justice were entirely independent propositions. He was supported by Houzeau de Lehaie and Passy, but only after another German, Hirsch, in addition to von Bar, had first asserted that it was impossible to establish the court until international law had been codified. Hirsch went so far as to say that persons should not make themselves ridiculous by taking up such projects. From this we can easily see that at the meeting of the Interparliamentary Union it was those who were interparliamentarians in the strict sense and not pacifists, who almost defeated the motion made by Stanhope; and it was only saved by the support which it

[1] As Bertha von Suttner (*Memoirs*, pp. 289, 297, 313) points out, Stanhope was also acting under the influence of Gladstone in making his proposal.

received from those who were in the strict sense of the term pacifists. Von Bar, Hirsch, and Tydeman were merely interparliamentarians; but Passy, Houzeau de Lehaie, Stanhope, and Gobat were pacifists in the strict sense. In the commission which was appointed by the Interparliamentary Union at this meeting to examine the project of the arbitration court, four pacifists were the only ones who later presented plans—Stanhope, Rahusen, Gobat, and Houzeau de Lehaie. The last-mentioned also made the report to the Interparliamentary Union at its session at Brussels. The name of Houzeau de Lehaie, signed to the report of the commission of the Interparliamentary Union, is also signed to the report of the Universal Peace Congress at Antwerp in 1894, of which Houzeau de Lehaie was president. No further facts are needed to show the close connexion between the draft of the Interparliamentary Union at Brussels and those of the preceding Universal Peace Congresses.[1] It is a point of special importance in this connexion that the basic principle of a list of judges had already been advocated unanimously by the Antwerp Congress.

Under these circumstances it is all the more to the honour of the pacifists when we consider that the next Universal Peace Congress, which met at Budapest in 1896, set aside its own valuable preliminary labours upon an independent project, and chose rather to give its warm support to the project of the Interparliamentary Union and to recommend to the powers the acceptance of it. That act was of marked service to the cause; for by it the agitation was kept from being divided in favour of several

[1] The connexion between the Peace Congress at Antwerp and the meeting of the Interparliamentary Union at The Hague I find already pointed out in 1905 by Moch in his book, *Désarmons les Alpes*.

distinct projects, and the whole influence was brought to bear upon the accomplishment of a single project. In spite of all its own good work in connexion with the subject, the Universal Peace Congress at Budapest did not attach the slightest value to coming before the public with a project all its own, but contented itself in all modesty with recommending the project of the Interparliamentary Union which it had influenced. This unselfishness cannot be too highly estimated. Precisely on that ground the historian has all the more reason to lay special stress upon the great merit of the preceding Universal Peace Congresses. The Universal Peace Congress at Hamburg, in 1897, also adopted a resolution in favour of a permanent international court of arbitration.

This does not detract from the work of the Interparliamentary Union, which has won a place in history. This association, indeed, interceded with the whole force of its prestige in favour of the project for a court of arbitration, and succeeded in directing the attention of governments to the problem of an arbitration court to a far greater extent than ever before. Not only did the masterly memorial of Descamps contribute to that end, but likewise the two resolutions taken at Budapest in 1896 and at Brussels in 1897, in which the Union again recommended that project and exhorted its members to intercede with their governments for its realization.

In addition it must be pointed out that the Interparliamentary Union twice before 1894 took up the question of a permanent court of arbitration. The Congress at Rome in 1891 for the first time called upon the interparliamentary committees of the individual countries to place the question of the permanent court upon the programme of the next conference. In 1892 Hilty, a professor at Berne, submitted

to the Interparliamentary Conference at Berne a project in which he advocated that each state should hold ready a list of five persons competent to perform the duties of arbitrator. The contending parties were then to appoint their arbitrators from the lists of five different states which were not connected with the dispute. The Interparliamentary Union referred this project to a commission of six members under the presidency of Stanhope, who made the above-mentioned motion at The Hague in 1894. There is no special connexion, however, between the motion made by Stanhope in 1894 and the work of the commission appointed in 1892. As was pointed out above, Hirsch, the German member of the commission of the Interparliamentary Union at its session at Berne, spoke against any further activity of the Interparliamentary Union in connexion with the project of an arbitration court. Hilty's project was a private endeavour which, in consequence of the inactivity of the commission appointed at Berne, produced no results. No specific plan for a permanent court of arbitration was recommended by the Interparliamentary Union before its session of 1895, as had been done by a number of previous Universal Peace Congresses.

The project of the Interparliamentary Union at its session at Brussels was in its political foresight a masterly document. It was so drawn up that without renouncing their prerogatives too far the states could create a court of justice after that fashion; and although the ideal of an international court of justice, as we have shown above, is of a different character, particularly in that it calls for a truly permanent court instead of a list of judges, yet the compromises offered by this project were always acceptable. In particular the principle of the equality of states was recognized. The questions of the burden of expense (the

parties to the case and not the community of states were to pay the honoraria of the judges) as well as that of the constitution of the court were, to be sure, less commendably handled. In particular the president of the court was given too great power.

The Institute of International Law and the International Law Association have given considerably less support to the work of the Interparliamentary Union than has been given by the Universal Peace Congresses.

The Institute of International Law occupied itself with the question of an arbitration court especially in the seventies of the last century. The only practical outcome, however, was a very significant project of Goldschmidt dealing with arbitral procedure for special arbitration courts. Goldschmidt [1] rejected the idea of the creation of a permanent court of arbitration in the following words:

> This institution is unknown to existing international law, and the obstacles to its creation between absolutely sovereign states appear to be difficult to surmount.

The bold Dutch pacifist, den Beer Poortugael, was the only one at that time to propose a permanent court of justice.[2]

The International Law Association frequently occupied itself before the First Hague Conference with the question of a permanent court of arbitration. As early as 1875 Richard proposed at the meeting at The Hague the creation of a court of arbitration, but he failed to win a sufficient following. At the conference held at London in 1893, a

[1] *Revue de droit international*, 1874, p. 422.

[2] *Bulletin de l'Institut de droit international*, 1875, p. 133. As late as 1900, Anitchkow, in his work *War and Labour*, written before the Hague Peace Conference, praises the far-sighted attitude of the Institute upon this question.

special committee was entrusted with the elaboration of a project for an international arbitration court. However, as this project merely sought to regulate arbitral procedure and did not enter into the idea of a permanent court of arbitration, the meeting at Brussels in 1895 referred the question of the permanent court of arbitration to a new committee. But this committee did not present its report until 1899, at Buffalo, at the time when the Hague Peace Conference had already reached a provisional agreement upon the subject.

Finally, special mention is due to the notable and continued efforts of the Lake Mohonk Conferences, which at all of the meetings from 1895 to 1899 advocated a permanent court of arbitration. The first conference of 1895 [1] promptly adopted a resolution in which the President of the United States was requested to take the initiative in the creation of a permanent court of arbitration, and a commission consisting of Abbott, Earl, and Hale, was appointed to study the question. This commission presented a detailed report in 1896. At this second meeting Hodgson Pratt recommended the project of the Interparliamentary Union as 'the most authoritative'.[2] Furthermore, the meetings of 1898 and 1899 gave first consideration to the plan of an arbitration court.

### 3. The Permanent Court of Arbitration of the First Hague Conference

According to the first circular letter of the Czar the question of an arbitration court was not to figure at all in the programme of the First Hague Peace Conference. Martens, who was entrusted by the Czar with the drafting

[1] Report, p. 52. [2] Ibid., p. 70.

of the second circular letter, was the first to place the erection of a permanent court of arbitration upon the programme of the Conference, although only a general reference was made in the second circular letter to 'freely chosen arbitrators'. But under the reference to these freely chosen arbitrators Russia secretly included the question of a court of arbitration as well. Projects for a permanent court of arbitration were presented to the Conference by Great Britain and the United States as well as by Russia. While the American and British projects merely proposed the drawing up of a list of arbitral judges from among whom the contending parties in a given dispute were to appoint the requisite judges, the Russian project desired at least to determine in advance those states each of which was to appoint a member of the court when a dispute should arise. The provisions elaborated by the Hague Conference are based upon the British project, since this provided the greatest freedom for the parties.

With regard to the necessity of a strictly legal decision of disputes and the development of international law by that means, there was as little agreement at the First Hague Peace Conference as there was at the numerous international private congresses which had occupied themselves with that problem.

At the meeting of the First Commission on July 17, 1899, Martens made the following characteristic remarks: 'The aim and object of arbitration is to dispose completely of a dispute. The great utility of arbitration lies in the fact that the moment the arbitral award has been duly published the affair is at an end.' That in addition to arbitration there also existed a method of judicial settlement with the object of developing international law was

entirely overlooked by Martens. With the exception of Descamps and Rahusen no other delegates at the First Hague Conference called attention to this important work of the Hague Conferences. The delegates, who it is true came in part unprepared for their difficult tasks, looked upon arbitration merely as a means of settling the particular dispute before the court. They did not recognize the necessity of the judicial settlement of international disputes, whereby future disputes as well would be prevented by reason of established legal principles. But nevertheless some of the delegates at least had doubts whether the settlement of disputes was not being accomplished at the cost of justice. Holls and Seth Low in particular called attention to the necessity that the decision should do justice to each party, and that in consequence an appeal should be allowed as a guarantee against wrong decisions. In like manner opposition was encountered upon the question of judicial opinions. Here again Martens pointed out that in view of the political nature of arbitration judicial opinions should not accompany the decisions; that to be sure in this way the science of law would be given firm foundations, but that in an international dispute the judges were at the same time representatives of their governments, and it should not be expected of them that they should set forth in detail what might possibly be a sentence against their government, since they would be forced thereby to demean its political prestige.

This view of Martens met with strong opposition from all the others. The German delegate, Zorn, was the first to reply, and he declared that a legal decision without an accompanying judicial opinion was not to be thought of. Descamps, Holls, and Asser in particular agreed with Zorn. But these speakers, instead of pointing out the necessity

of developing international law by means of legal decisions, kept expressing the one idea that provision must be made for the necessary impartiality in the individual decision. Thus Descamps spoke as follows at the meeting of the Commission on July 17:

> The committee was not in agreement upon the question. As for himself he thought that the obligation of rendering a judicial opinion constituted a fundamental guarantee. There were questions which could not be answered by yes or no, and in such a case it was the judicial opinion which justified the decision. There was no case in which a decision had been rendered without being accompanied by the grounds upon which it was based.[1] He did not think that the objections pointed out by Martens were insurmountable and irreconcilable with the obligation of formulating a judicial opinion. The form and extent of these opinions were left to the judgment of the court. Moreover, if states wished to provide against a case when there would be serious objections against formulating a judicial opinion, they were free to excuse their arbitrators from this formality.

It must be conceded that in this statement the question of the development of international law received no mention at all. But nevertheless two of the speakers, Descamps (on a former occasion) and Rahusen, touched briefly upon this point in referring to the fact that unless international decisions were accompanied by judicial opinions no consistent series of legal decisions could be developed. None of the other speakers took up the ideas thus casually thrown out. It must be said that the idea of a judicial system did not receive due consideration.

If one considers without prejudice the results of the First Hague Peace Conference in the domain of arbitration, one

[1] That this has, however, happened is pointed out by Renault, p. xii of the *Recueil des arbitrages*.

must admit that in that celebrated convention strictly legal and arbitral elements were confounded. Arbitration seeks the settlement of disputes upon the basis of equity; judicial settlement, on the other hand, seeks to give to the parties their due. The equitable settlement of disputes will best be secured by a court whose members are appointed by the parties. The strictly legal settlement of a dispute, however, calls for a permanent court of justice. Accordingly, the First Hague Conference should have made its choice between arbitration and judicial settlement in international law.

It did not, however, do so, but in a general way it saw in what was at that time called international arbitration a uniform institution; it did not recognize the two constituent parts of that institution, or suspect that within a short time there would be brought about a division of the so-called international arbitration into 'international judicial settlement' and 'international arbitration in the strict sense'. That is all the more extraordinary since to the casual observer this lack of unity is at once noticeable. Meurer in his *Haager Friedenskonferenz*[1] speaks as follows, though without making clear the whole import of his statements:

> My objections can be summed up in the fact that judicial institutions can only be set up with difficulty, and hence would rarely be set up as an actual fact, and political influences are still too prominent in them.

The mistake of the First Hague Conference can, to be sure, be well understood when one remembers that up to that time arbitration alone existed in international life, and judicial settlement was not known. That was quite natural. For judicial settlement presupposes permanent

[1] Vol. i, p. 369.

judges, and up to that time no such judges had been appointed by the international community.

What the First Hague Peace Conference desired was, and here I am opposed to Scott[1] and Beernaert,[2] the further development of international arbitration, and accordingly the settlement of disputes *ex aequo et bono*. But at the same time, by making a compromise with international arbitration, it laid the foundations of international judicial settlement. It did so at the very time when it provided that disputes should be settled by the Hague Court of Arbitration 'on the basis of respect for law', instead of according to equity, and also by the provision that strictly legal disputes could best be settled by arbitration, whereas in fact they will be much better settled with the help of a judicial institution. Arbitration is especially suited to political questions, and on the other hand, judicial settlement, which by a strictly legal decision is at the same time to contribute to the development of international law, is suited above all to disputes of a more or less legal character.

Thus the Hague Permanent Court of Arbitration, while unable by its organization to serve the cause of international judicial settlement, at the same time is not adapted to the system of international arbitration, which in principle calls for the complete freedom of the parties in the choice of judges, and is opposed to the imposition of any restriction which would limit the selection of arbitrators as far as possible to the members of a small list of judges.[3] In a third of the disputes referred to the Hague Court of Arbitration the states have appointed their arbitrators from persons not inscribed upon the list of the International

[1] Vol. i, p. 348; vol. ii, p. 315. [2] p. 332.

[3] See Baty, *International Law*, pp. 5 et seq.

Bureau. Besides this they have had recourse more frequently to special arbitration courts than to the Hague Court. The actual practice therefore shows that the system of arbitration seeks the most complete freedom in the choice of judges, and that a limitation of this freedom is not permanently practicable. This development was dimly suspected in 1899, and in consequence no compulsion was provided for in the provision that the parties must make a selection of arbitrators from the list of the Hague Court, but the selection from the list was merely laid down as a general rule. But even in this case there was an abandonment of the fundamental principles of arbitration.[1]

As a transitional step from international arbitration to judicial settlement the Hague Permanent Court was a necessity, since it above all led the states to take the first and hardest step upon the road to judicial settlement. The fact that nearly all states are actively considering the problem here under discussion is to be ascribed not least of all to the world-wide significance of the erection of the Hague Court of Arbitration. The Hague Court of Arbitration will in the course of history come to be more and more recognized as an institution of historical significance, and those who in loyalty to the great results of the First Hague Conference opposed every development of them can take comfort above all in this thought. The creation of a truly permanent court of justice can never attain the historical significance of what was accomplished in

[1] These facts also account for the proposal which I made above that henceforth only jurists should be designated for the list of the Hague Court, in order that these jurists might choose the judges of the international court of justice. For although arbitration demands complete freedom and in my proposal diplomats are excluded, yet it must be remembered on the other hand that the appointment of arbitrators is already restricted by the mere existence of the list of judges.

1899—not, at least, what was accomplished by Zorn.[1] For what was accomplished in 1899, in carrying on the development of civilization to a higher perfection, was accomplished in the face of indescribably strong opposition, whereas the new court of justice may be regarded at the present day as already won.

It is Revon's great service to have recognized clearly in his distinguished treatise *L'arbitrage international*,[2] crowned by the Institute of France, that the world would not obtain an international court of justice all at once, but would only arrive at that goal gradually by way of arbitration. He wrote in 1892:

> My observation of facts allows me to state that arbitration may be either optional or permanent, and that it tends more and more to abandon the first form in favour

[1] The study of Zorn's remarkable achievement of world-wide importance, the particulars of which I unfortunately cannot set forth in detail because they were communicated to me confidentially, exercised in the year 1908, and later, when I first gave my attention to it, a strong influence upon my mind and made of me a pacifist. The most impressive period in the development of my mental life was the time when I studied in Meurer's treatise time and again the proceedings of the memorable arbitration committee, which Zorn, at the session of the committee on June 9, 1899, declared he had followed with the greatest attention and deep sympathy. I was fortunate enough at that time to learn of the intimate details of that event from members, then living, of the committee and of the commission of the First Hague Conference; and when I reflected upon the reasons for that resolute action of the German delegates, I came to the conclusion that Zorn's achievement was not to be explained by his patriotism alone, but that at that turning-point in the world's history Zorn obtained, under the influence of Holls, d'Estournelles, Count Nigra, Bourgeois, Asser, Lammasch, and others, a suspicion of the grandeur of the pacifist ideal. It was then made clear to me that an ideal which was capable of accomplishing so much must have a future. Whether in Zorn's case also this suspicion ever became a belief is still doubtful; in any case every new article that Zorn writes shows how gradually he is being drawn into the peace movement.

[2] p. 488.

of the second, which will lead it by gradual and imperceptible steps to become more definite and more concise, so that it will crystallize, so to speak, into a true court.

At the Second Hague Conference it was again pointed out that the Permanent Court of Arbitration of 1899 was regarded by the First Hague Conference merely as an experiment.[1]

That the formation of a permanent list of judges is merely the preliminary step to a truly permanent court of justice, and that it is precisely this which constitutes the significance of the Hague Court of Arbitration, can be seen in the development of national law in numerous countries. The eminent American, Scott, in various articles[2] has called attention to the fact that in Roman law there are three stages of development to be distinguished:

1. The parties choose for themselves definite persons as arbitrators.
2. A permanent list of arbitrators is drawn up from which the judges are selected.
3. A permanent court of justice is established.

Dr. Tettenborn likewise says, very appropriately, in her treatise upon the Hague Court of Arbitration:[3] 'The list of arbitrators is a contrivance similar to the *album iudicum selectorum* in which the names of Roman citizens were entered, from among whom the prætor selected the *iudex* in each individual case.'

In connexion with the very exhaustive article of Scott in the *American Journal*,[4] I may be allowed to add a few

[1] See Scott's report, vol. i, p. 349.

[2] 'An International Court of Arbitral Justice' in *The Outlook*, New York, June 18, 1910, p. 369; 'One Aspect of the Peace Movement' in *The Alumni Quarterly*, Illinois, 1911, p. 204; 'Some Phases of the Peace Movement,' Address at Mohonk, New York, May 24, 1911, p. 5; and 'The Evolution of a Permanent International Judiciary' in *American Journal*, 1912, pp. 316–58.

[3] p. 59.

[4] 1912, pp. 315 et seq.

further words upon the development of Roman arbitration, since it has a very instructive bearing upon our subject. But, unlike Scott, I see not merely analogies but also sharp differences in the development of procedure in Roman law and in international law.

Self-help was in the beginning the prevailing method in Rome. Then the two parties chose as arbitrator some third person who in consequence of his religious or secular office was particularly influential. It frequently happened then that the parties turned to the prætor as being specially versed in the law. As the prætor received more petitions than he could answer, he found it necessary to appoint another competent person to settle the dispute as judge. But even the judge thus appointed performed his functions merely with the consent of the parties. For if the defendant were unwilling to come before the prætor, the latter could not appoint a third person to act as judge in the dispute. The judge was only a private person and in no way an official behind whom stood the power of the Roman state. The similarity between this judge and the arbitrator who in earlier times had been appointed directly by the parties led a Roman jurist to remark: *Compromissum ad similitudinem iudiciorum redigitur.* The decision of the judge was moreover not a judgment, but merely an award (*sententia, pronuntiatio*), as the victor in a legal dispute was obliged to carry out the decision himself by means of *manus iniectio,* and the state did not give him its support in the execution of the decision. In every case a mutual agreement of the parties was required for proceedings *in iure,* and for this reason von Jhering [1] has also described the *litis contestatio* as a contract by which the parties appointed the arbitrator in the presence of the prætor.

[1] *Geist des Römischen Rechts,* vol. i, 3rd ed., p. 171.

Just as happened in the case of international arbitration at the First Hague Peace Conference in 1899, the choice of the judges was limited by the provision of the *lex Aurelia* (70 B.C.), under which the Senate drew up a list of arbitrators whose names were published by the prætor in the *album iudicum*. Side by side with the ordinary procedure, according to which the prætor appointed the judge, there later arose in special cases the extraordinary procedure under which the twofold division was discontinued and the prætor decided the case as an official judge. From the time of Diocletian and his immediate successors, there existed only the extraordinary truly judicial procedure. The judges were now permanent officials and decided in the name of the Roman state. From this we see clearly that arbitration stands half-way between self-help and judicial decision. It must, in so far as it represents a formal method of settling disputes, be regarded not as the end of a development, but merely as a transitional step.

Accordingly, if we compare briefly the development of procedure in Roman and in international law, we must take as the *tertium comparationis* merely the transition from arbitrators appointed by the parties to a list of arbitrators, and then further to a permanent tribunal, and not likewise the development of the arbitrator as a person acting with the consent of the parties into an official placed over the parties and deciding by the authority of the state. Only when we keep this before our eyes shall we rightly understand the analogy between the development of procedure in Roman and in international law.

In his article 'The Necessity of a Permanent Tribunal' [1] Nys has shown that this development took place in other

[1] Baltimore, 1910; also *Revue de droit international*, 1906, pp. 6, 7.

countries as well.[1] The recent development of international arbitration, and in particular the American proposal at the Second Hague Conference, has shown that this comparison is to the fullest extent justified. In addition numerous authors, e.g., Pradier-Fodéré,[2] Kamarovski,[3] and Mougins de Roquefort,[4] have as a body expressed the view that in international law, as in national law, the establishment of a judicial system has in every case had its origin in arbitration.

A particularly interesting example of this development is furnished us in the history of the formation of the Supreme Court of the United States,[5] whose special function it is to decide disputes between the individual states of the union. The Articles of Confederation of 1778 had provided that such disputes should be settled by a court of arbitration chosen in each case by the parties or by Congress from a list of arbitrators. This arrangement, however, did not stand the test. Scott[6] says that 'the net result of procedure under Article 9 was the trial and final determination of one case (Pennsylvania *v.* Connecticut); the appointment by mutual agreement of commissioners in two controversies, settled, however, out of court (Massachusetts *v.* New York; South Carolina *v.* Georgia); with petitions for the appointment of a court in some three other cases. The temporary tribunal was unsatisfactory.' Accordingly the new Constitution of 1789 established a permanent court of justice of nine members, who are appointed by the president with the approval of the Senate.[7]

[1] See, in the case of France, especially Vavasseur, *L'Organisation d'une juridiction arbitrale internationale*, 1907, pp. 11 et seq.

[2] *Cours de droit diplomatique*, vol. ii, p. 472.

[3] p. 108. [4] p. 236.

[5] It is set forth in detail by Scott in *American Journal*, 1912, pp. 336 et seq. [6] *The Hague Peace Conferences*, vol. i, p. 464.

[7] See also Report, 1911, p. 106.

The literature of international law in Germany has not recognized the inconsistency in modern arbitration due to the presence of strictly legal elements. A. H. Fried alone has forcibly called attention to these facts with his usual clear insight. In his valuable *Handbuch der Friedensbewegung* [1] he writes as follows:

> It becomes clearer every day that arbitration is only a transitional institution by which states are first of all to be accustomed to the legal settlement of their disputes. As a matter of fact there is also in the very nature of arbitration the inconsistency of all transitional institutions. It makes use partly of diplomatic means and partly (and at the present day to an ever greater extent) of juristic means. The arbitrator is at times not a true judge, but merely a diplomat. As he is bound by no law he will be in a position to settle a dispute by diplomatic agreement. Whereas on the other hand the ordinary municipal judge will always decide according to law only, whether according to the statute law of the state or (when there is none such at hand) according to the general legal principles determined by custom and good judgment.

Dumas spoke in similar terms at the Sixteenth Universal Peace Congress at Munich: [2]

> Arbitration is only a stage on the way towards the organization of an international judicial system, the attainment of which involves the established right of every state to institute an action directly before the competent jurisdiction, without a preliminary *compromis*.

From the provision of the First Hague Conference that international arbitration has for its object the settlement of disputes 'upon the basis of respect for law', and from the other strictly legal elements present in the Hague Convention, it cannot fail to be seen that the development of international arbitration into judicial settlement is

[1] 2nd ed., 1911, vol. i, p. 195.

[2] Bulletin, p. 54.

making ever greater progress. Certain incidents which have recently taken place point out this clearly. It is a remarkable fact that since 1899 the states have continued to reappoint as arbitrators those who have already had experience in the field of international arbitration. Of the numerous arbitration courts which have met at The Hague since 1899 in conformity with the Convention for the pacific settlement of international disputes, not one can be named in which the judges of the court were all *homines novi* in the field of international arbitration.

In every case a number of the arbitrators had obtained great experience and were the embodiment of a tradition. Men such as Gram, Matzen, and Martens were repeatedly chosen in the old period preceding 1899. The new judges who stood the test were constantly reappointed: thus Renault was reappointed five times, Lammasch and de Savornin Lohman each four times, Fusinato and Hammarskjöld each three times, Fry, Beernaert, Asser, Kriege, and Baron Taube each twice. In selecting such men who had already distinguished themselves it was doubtless the intention to secure a guarantee that the decision would be as far as possible a legal and impartial one. For the same reason the appointments were almost exclusively of jurists and not of diplomats. Of the forty-nine arbitrators appointed up to this time only one can be designated as a diplomat pure and simple, namely, the Japanese, Motono. All the others were either wholly jurists, or, if diplomats by profession, persons who had won a reputation for their knowledge of international law. One need only go back to the earlier times when recourse was much more often had to mere diplomats and in particular to irresponsible sovereigns, in order to mark the progress of the development in the direction of the judicial settlement of international

disputes. Such methods are milestones upon the road towards judicial settlement, which presupposes a tradition and the exclusion of mere diplomats. In recent times the desire of the states for a permanent court is particularly manifest in the fact that the arbitrators appointed to decide the case of the *Manouba* and the *Carthage* were, with the exception of Baron Taube, identical with the arbitrators of the Casablanca arbitration court.

It would not be necessary to discuss in such detail the twofold nature of the Hague Court of Arbitration if certain scholars were not continually holding up that court as the ideal institution for the settlement of international disputes. As a matter of fact, the Hague Court of Arbitration and the above-mentioned projects of unofficial congresses, in particular the project of the Interparliamentary Union at its meeting at Brussels, are only valuable in so far as they have shown mankind the way to a higher development. On the other hand, certain other projects, in particular that of Count Kamarovski, regarded in their theoretical and logical character, stand upon a noticeably higher plane.

### 4. The Project of the Second Hague Peace Conference

Shortly after the First Hague Peace Conference the International Law Association at its meeting at Buffalo on August 31, 1899, brought forward a project of an international court of arbitration, in which it was advocated, for the first time after the Hague Conference, that the judges of the court of arbitration should be in permanent residence at The Hague. The arbitrators appointed by the states were to work out a ' code of international law and the states were to have complete freedom as to which

judges they desired to appoint from among the members of the court in the individual case. We have already met with similar projects above. The Interparliamentary Union at its meeting at Paris in 1900 emphasized still more sharply the necessity of establishing a truly permanent court of justice and a special resolution was passed to that effect. At the second Pan American Conference[1] of 1901–2, Guatemala made a motion for the erection of a permanent court of arbitration for claims for indemnity and other money claims, but it was not adopted.

No other projects worthy of special note were proposed from that time until the Second Hague Peace Conference.

The *Institut international de la Paix* put forth in 1907 two drafts, drawn up by Vavasseur and Lepert, for a permanent court of justice, but neither was of any special value. Vavasseur proposed a court of justice consisting of sovereigns and ambassadors, which was to have direct jurisdiction to decide serious disputes.[2] Lepert advocated, as did Duplessix later, a sort of world federation of states. Much more important are the proposals made at the same time by the Dutch lawyer, Stipriaan Luiscius. In his book *L'Avenir de l'arbitrage international* he proposed that there should be in addition to the Hague Court of Arbitration a court of appeal, which was also to have jurisdiction as a court of first instance in certain specified cases. His proposal aims rather at a development of arbitration than of judicial settlement, and on many points goes too far. It is gratifying that Stipriaan Luiscius does not give any consideration to the enforcement of judicial decisions, which is at present merely a Utopian idea.

The Judicial Arbitration Court[3] proposed by Scott and

[1] Proceedings of the Conference, pp. 290 et seq.

[2] See above, p. 53.

[3] See translator's note, p. 127.

Choate at the Second Hague Peace Conference and based upon the instructions of Root [1] was in its fundamental principles for the most part an excellent proposal. Had the principle of the equality of states been recognized in it, it is very possible that the states might have agreed upon it. But it is to be regretted that the justifiable protest of the small states received so little consideration. In Scott's excellent report the distinction between arbitration and judicial settlement in international law is brought out more clearly than ever before. Scott showed that on the one hand there are disputes which the parties regard as rather political in character, and on the other hand there are disputes which the parties regard as of a strictly legal nature, and that cases involving the first class of disputes should be settled by arbitration upon the principles of equity, and cases of the second class by a real court of justice upon principles of strict law.

In this connexion it is of interest to inquire how far the Judicial Arbitration Court of the Second Hague Peace Conference, and also the International Prize Court adopted at the same time, would have fulfilled the conditions of an ideal international court of justice in case the two Conventions had been ratified.

In chapter iv we learned to recognize the following marks as characteristic of an international court of justice:

1. No diplomats, but judges by profession.
2. The exclusion of national judges.
3. A truly permanent court of justice.
4. The exclusion of members appointed by the contending parties and above all by the states.
5. A direct right of action.
6. The creation of a right of appeal.

[1] Scott, *The Hague Peace Conferences*, vol. ii, p. 191.

In contrast with these conditions both nationals and diplomats may sit upon international courts of arbitration; the court may be constituted for each particular case; a *compromis* must be entered into; a right of appeal may not be given. For the object of arbitration, namely, the settlement of disputes according to equity, will in this way be fully attained. At the same time it must, indeed, be pointed out that what is at present called arbitration is not strictly arbitration, but contains many elements of a legal nature. In order to bring about a sound development of the present form of arbitration in the direction of judicial settlement, numerous authors have advocated the exclusion of national judges and the creation of a court to which an appeal may be taken from the present arbitration courts. These improvements in arbitration would not need to be realized if we had an international judicial system. For in that case the ideas of arbitration and judicial settlement could be kept completely separate.

Great confusion existed at the Second Hague Peace Conference over the nature of the Judicial Arbitration Court. Scott,[1] Barbosa,[2] and Carlin[3] called it a 'judicial institution'; Lammasch, Mérey, Beldiman, and Martens called it an 'arbitral institution'.[4] Renault[2] and Bourgeois[5] declared that the new court at all events was an 'approach' to a judicial institution. Fry[2] even thought that arbitration and judicial settlement were the same thing in international life. Under these circumstances Beldiman[6] was entirely right when he pointed out that 'there are differences not only as to external form but also as to principle between the opinions of Messrs. Scott and

[1] pp. 316, 658. [2] p. 658. [3] p. 146.
[4] pp. 16, 658; see Moch, *Autour de la Conférence*, p. 23.
[5] p. 615. [6] p. 660.

Lammasch, and even between the opinions of the authors of the project'. Accordingly, the diversity of opinion in 1907 became of necessity all the greater when, for example, Scott justly represented an international judicial court as an ideal worthy to be striven for by the community of states, whereas Barbosa declared that 'arbitration is the sole judicial system which can be established between nations'.

The Judicial Arbitration Court is undoubtedly in its essential nature to be designated as an international court of justice, as Davis[1] also points out. Its chief function was to render judicial decisions and to develop international law. It is true that of all the individual technical requisites of an international court of justice, the only condition which it fulfilled, to be sure a very important one, was that of a permanent institution. Moreover, the judges were regarded as essentially judges by profession, but diplomats were not in consequence excluded if they possessed a knowledge of international law,[2] nor were national judges excluded.[3] An agreement could not be reached concerning the appointment of the judges; though the majority of the projects provided that the judges were to be appointed by the individual states. The parties were not given a direct right of action nor was an appeal allowed. Accordingly it must be said that the Judicial Arbitration Court was indeed in its intrinsic nature a judicial institution, but that there were present in its exterior constitution too many of the characteristics of a court of arbitration.

To come back, therefore, to the controversy at the Second Hague Peace Conference concerning the nature of the Judicial Arbitration Court, we must concede that the view of Bourgeois and Renault that the new court was an

[1] *The Elements of International Law*, p. 262.

[2] Article 2 of the Draft.

[3] Article 20 of the Draft.

approach to a 'judicial institution' can be very well maintained, although the view held by Scott does greater justice to the intrinsic nature of the court. On one occasion Bourgeois[1] remarked very appropriately that 'the prime consideration will be not to weigh interests but to give justice'.

The project of the Second Hague Peace Conference for the creation of an International Prize Court comes much nearer to the ideal of an international judicial court. This court will not merely settle disputes, but in addition develop international law by its judicial decisions. Like the Judicial Arbitration Court, it was regarded as permanent. Moreover, the parties had a direct right of action. But although the judges were to be principally judges by profession, yet diplomats were not excluded nor strictly national judges. In like manner the appointment of the judges was made by the states. The fact that no right of appeal against the decision of the International Prize Court is granted cannot, indeed, detract from the truly judicial nature of the Prize Court, because the Prize Court was to act as a court of appeal from the decisions of national courts, and was thus itself regarded as a court of appeal.

Thus in the case of the International Prize Court there are still present isolated external characteristics of international arbitration.

### 5. Recent American Proposals—Central American Court, Proposal of Secretary Knox, British-American Arbitration Treaty

The Central American Court established in 1907 at the first Central American Conference between the five Central American states, Costa Rica, Honduras, Nicaragua, San

[1] p. 682.

Salvador, and Guatemala, is a truly permanent court, is composed of judges by profession, and can be resorted to by a state directly upon its own motion without the necessity of a previous *compromis*. Yet even here the ideal of an international court is not quite attained, since the judges are always in part nationals of the contending parties and are appointed by them. As is well known, the court is composed of one national from each of the five republics. Moreover, no provision is made for an appeal. The fundamental idea of the Central American Court is above all to 'dispose of disputes', as is evident from the history of its establishment under the influence, more or less, of the United States. As a matter of fact the development of international law by this court would be of little value, since this can only be done by a court embracing all the states. The Central American Court of Justice, which may serve as a model in many respects for the new world court, is a peculiar and unique phenomenon, which has only arisen in consequence of the state of unrest in Central American relations. We experience here the singular fact that a permanent judicial court exercises chiefly arbitral functions.

On October 18, 1909, Mr. Knox, the Secretary of State of the United States, surprised the world with an important circular note in which he proposed to the states participating in the Second Hague Peace Conference that the International Prize Court should be ratified under an arrangement that it should at the same time be authorized to perform the functions of a court of arbitral justice. This circular note read as follows: [1]

> It has been a subject of profound regret to the Government and people of the United States that a Court of

[1] *American Journal*, Supplement, 1910, p. 102.

Arbitral Justice,[1] composed of permanent judges and acting under a sense of judicial responsibility, representing the various judicial systems of the world and capable of insuring continuity in arbitral jurisprudence, was not established at the Second Hague Peace Conference, and the United States likewise regrets that the composition of the proposed Court of Arbitral Justice has not yet been effected through diplomatic channels, in accordance with the . . . recommendation of the Conference. . . .

A careful consideration of the project and of the difficulties preventing the constitution of the court, owing to the shortness of time at the disposal of the Conference, has led the Government of the United States to the conclusion that it is necessary in the interest of arbitration and the peaceful settlement of international disputes to take up the question of the establishment of the court as recommended by the recent Conference at The Hague and secure through diplomatic channels its institution.

The necessary and close connexion between the International Prize Court and the proposed Court of Arbitral Justice was indicated in Article 16 of the Draft Convention of the Court of Arbitral Justice as follows:

> The judges and deputy judges, members of the Judicial Arbitration Court, can also exercise the functions of judge and deputy judge in the International Prize Court.

The reason which existed in 1907 and led to the formulation of the articles still continues. It has therefore occurred to the United States that the difficulty in the way of reaching an agreement upon the composition of the court would be obviated by giving practical effect to Article 16 by an international agreement by virtue of which the judges of the International Prize Court should be competent to sit as judges of the Court of Arbitral Justice for such nations as may freely consent thereto, and that when so sitting the judges of the International Prize Court shall entertain jurisdiction of any case of arbitration submitted by a signatory for

[1] See translator's note, p. 127.

their determination and decide the same in accordance with the procedure prescribed in the Draft Convention. In proposing to invest the International Prize Court with the jurisdiction and functions of the proposed Court of Arbitral Justice the United States is actuated by the desire to establish a court of arbitration permanently in session at The Hague for the peaceful solution of controversies arising in time of peace between the nations accepting and applying in their foreign relations the principles of an enlightened and progressive international law.

It is a truism that it is easier to enlarge the jurisdiction of an existing institution than to call a new one into being, and as the judges and deputy judges of the International Prize Court must be thoroughly versed in international law and of the highest moral reputation, there can be no logical or inherent objection to enlarging their sphere of beneficent influence in vesting them with the quality of judges of the proposed Court of Arbitral Justice.

The proposal of the United States does not involve the modification either of the letter or spirit of the Draft Convention, nor would it require a change in wording of any of its articles. It would, however, secure the establishment of the Court of Arbitral Justice as a chamber of the world's first international judiciary and thus complete through diplomatic channels the work of the Second Hague Conference by giving full effect to its first recommendation.

In proposing this solution of the difficulty the United States is influenced by daily practice and procedure in its national courts of justice, where one and the same judge administers law and equity, admiralty and prize, which, under its system of procedure, are different systems of law. The United States therefore proposes that in the instrument of ratification of the International Prize Court Convention, signed at The Hague October 18, 1907, any of its signatories consenting to invest the International Prize Court with the powers of a Court of Arbitral Justice shall signify its assent thereto in the following form:

*Whereas*, It is highly desirable that the Court of Arbitral Justice, approved and recommended by the Second Hague Peace Conference, be established through diplomatic channels; and

*Whereas*, Investing the International Prize Court with the duties and functions of the proposed Court of Arbitral Justice would constitute for the consenting powers the said Court of Arbitral Justice, as recommended by the first *vœu* of the Final Act of the said conference;

Therefore, the Government of . . . . . agrees that the International Court of Prize, established by the Convention signed at The Hague October 18, 1907, and the judges thereof, shall be competent to entertain and decide any case of arbitration presented to it by a signatory of the International Court of Prize, and that when sitting as a Court of Arbitral Justice the said International Court of Prize shall conduct its proceedings in accordance with the Draft Convention for the establishment of a Court of Arbitral Justice, approved and recommended by the Second Hague Peace Conference on October 18, 1907.

At the sixteenth Lake Mohonk Conference, held in May 1910, Knox's proposal was warmly advocated by almost all of the speakers. Trueblood and Baldwin alone expressed their doubts about it. The Conference had, to be sure, a special reason for looking upon the project with great sympathy, because at the first conference at Lake Mohonk, in the year 1895, Dr. Hale had made an almost similar proposal. Hale advocated at that time a plan that Austria-Hungary, Germany, France, Great Britain, United States, and Russia should agree upon the organization of an international court of justice and invite the other states to appoint members. Thus the great powers would, by this proposal also, have imposed their will upon the other states in the appointment of the members of the new court.

At the Lake Mohonk Conference of 1910, Macfarland [1] pointed out that it was extremely probable that the new Court of Arbitral Justice would be established separately as an independent tribunal and not as a chamber of the Prize Court. From this very fact it is evident the most zealous friends of Knox's project are not all of the same opinion, and that they regard the project merely as a practical means of advancing nearer to the goal of an international court of justice.

It is clear from what has been said, that the principles which led me to reject the whole system of rotation must also lead me to regard the realization of Knox's project, which was warmly taken up by the Universal Peace Congress at Stockholm in 1910,[2] as not marking progress in the development of international law. It does not guarantee an impartial composition of the court for the great and small states alike, as Trueblood [3] and Count Apponyi [4] have rightly pointed out. At the Lake Mohonk Conference Marburg [5] adduced a quite original reason in favour of the unequal apportionment of judges. He declared that if all nations of the world were represented in equal proportion upon the court the European powers would view the new court with suspicion; for the United States was so preponderant on the American continent that the European powers would always believe that the South and Central American judges were, even though unconsciously, under the influence of the United States. If we are to act upon such conjectures we shall never succeed in reaching an agreement upon the composition of a court of justice.

[1] Report, p. 77. [2] Bulletin, p. 55. [3] Report, 1910, p. 30.
[4] *Union interparlementaire*, 1910, p. 133.
[5] Report, 1910, p. 86.

There is a further objection to Knox's proposal, which has been pointed out by von Plener also,[1] namely, that the International Prize Court itself would doubtless be called into question if the functions of an international court of justice for disputes arising in time of peace were also to be assigned to it. The distribution of seats upon the Prize Court is of such a kind as to favour the great powers. But as the Prize Court possesses a quite unique jurisdiction with regard to the laws of maritime warfare, in which the interests of the smaller states are not specially involved, they have for the most part given their assent to the apportionment of judges, even if in some cases only with reluctance. But it cannot be thought that these states would allow themselves to be degraded to the rank of second-class powers when there was a question of an institution so important and comprehensive (because not limited to a special field) as the creation of a world court of justice. Accordingly, they will positively reject the International Prize Court if the functions of an international court of justice be conferred upon it.

On the other hand, the further reasons adduced by von Plener against the proposal of Secretary Knox are not in point. In the first place the assertion that the Prize Court is a judicial court, and that the functions of an arbitration court cannot, therefore, be conferred upon it, is incorrect.[2] On the contrary, it is to be observed that according to Knox's proposal the Prize Court is to exercise judicial, not arbitral functions. In answer to von Plener's further assumption that the Prize Court is not a truly permanent one and will meet only in time of war, and that the judges are, moreover, specialists and therefore not versed in all

[1] *Union interparlementaire*, 1910, p. 99.

[2] See also Baldwin, Report, 1910, p. 81.

questions of international law,[1] it is evident from the nature of Knox's proposal that thenceforth the court would sit permanently and that, as Fried [2] has already pointed out, in the appointment of judges consideration would be given to a knowledge of international law as a whole. Hence only trifling modifications of the Prize Convention would be necessary, and these could be agreed upon in a supplemental act.

Nevertheless Knox's project must be rejected for the above-mentioned reasons. At the sixteenth meeting of the Interparliamentary Union at Brussels in September 1910 all the speakers, with the exception of those from the United States, spoke against the proposal. In particular, von Plener, Count Apponyi, and Franck opposed it vigorously. Nevertheless, as Eickhoff reports in the *Tag*,[3] he, as well as certain other continental members of the Conference, did not share in this view and were inclined to adopt Knox's proposal. That the opponents of the project won the upper hand at the Conference is evident from the resolution taken by the Conference, which reads as follows:

> The Interparliamentary Conference, in consideration of the important results to be expected from the adoption of the International Prize Court both in a general way and with respect to commercial interests, recommends that the Convention of October 18, 1907, relating thereto be ratified as quickly as possible, independently of any question relating to the organization of a permanent judicial court, although the Conference expresses its respect for the motives which have led the Government of the United States to make a proposal of this kind.

While Fried [2] thinks that the temporary nature of Knox's proposal must be borne in mind, since he only desired to

[1] See also Baldwin, op. cit.

[2] *Friedenswarte*, 1910, p. 186.

[3] September 24, 1910.

settle the question up to the time of the next Hague Peace Conference, it is my opinion that this problem is much too important to permit of a temporary settlement, and that we had better have no world court at all than a bad one.

The proposal of Secretary Knox had no prospect of being accepted after a representative of the German Foreign Office, in answer to an inquiry of Eickhoff, declared, on March 27, 1911, that the German Government could not agree to Knox's proposal. Accordingly the prophecy made by Pohl [1] has been fulfilled. In the face of the opposition of one of the great powers, so important a problem naturally cannot be solved.

As is pointed out in the *Friedenswarte*,[2] after the rejection of his first proposal Knox presented a new one to the powers. This proposal provided for the composition of the Judicial Arbitration Court in such a way that the small and medium-sized states were represented to the same extent as the great powers. This proposal must also be rejected, because it is in like manner based upon a form of rotation. If the sound principles of international law are not to be abandoned, there can be no question of any kind of unequal apportionment of judges, upon whatever ratio it is based. Only when all states are represented alike can the proposal be advocated, although, as we have pointed out, a complete guarantee for the impartiality of the judges only exists when they are not appointed directly by the states.

It would appear that Knox's proposal in its modified form has met with greater approval. However that may be, Knox had it announced at the Lake Mohonk Conference in 1911 that the International Court of Justice would be erected before the Third Hague Peace Conference,

[1] *Deutsche Prisengerichtsbarkeit*, p. 210.

[2] 1911, p. 55.

because the idea had recently made great progress with all the nations. According to a report of January, 1912, Knox was said to have received favourable answers from the governments as a body. Nevertheless I have my doubts as to the realization of the project. The address of Foulke [1] at the Lake Mohonk Conference of 1911, in which he declares that Knox's project was in principle the best settlement of the problem, and then proceeded to say that greater consideration would have to be shown to China in the apportionment of judges than was the case in the project for the Prize Court, tells the real truth. It is quite impossible to find a satisfactory solution by way of the system of rotation.

The legislative factors in international law alone force us to combat vigorously the temporary composition of a court with an unequal representation of the states. For if the powers are represented equally upon the court of justice they will later on relatively easily give their consent to have the judges appointed no longer by themselves but by an impartial organ. But the situation is entirely different if the states are represented upon the tribunal unequally. In such case the final goal of a truly ideal court of justice, whose members are no longer appointed by the states but by an impartial body of officials, can only be attained by the renunciation on the part of the great powers of the position of preponderance upon the court which they had previously had. Thus the slight need of a temporary settlement of the question will be purchased at the cost of making it very much harder to attain the goal of a completely ideal judicial system.

Moreover, the states must picture to themselves the following result of the system of rotation, which is pointed

[1] Report, p. 97.

out by Th. R. White.[1] As each state is to be represented upon the international judicial court in proportion to its external strength, all the states would thenceforth increase their armies and their navies all the more, in order to obtain greater respect and a correspondingly better representation upon the court, and thus the peace of the world would be all the more endangered.

Coming now to the last American proposal in this connexion, it must be pointed out that the project of an arbitration treaty between the United States and Great Britain is from the standpoint of the development of international law open to grave doubts. According to this project all differences which are to be settled by arbitration shall, at the request of one of the parties, first be referred to a commission of inquiry which is composed of three nationals of each of the parties, without a neutral umpire. The commission of inquiry is authorized to examine into and report upon the differences referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and further to include in its report such recommendations and conclusions as may seem appropriate to it. The findings of the commission shall not be regarded as decisions of the questions so submitted either on the facts or on the law, and shall in no way have the character of an arbitral award. The reference to such a commission of inquiry may, if either party so desires, be postponed until the expiration of one year after the date of the formal request therefor in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy.

The second task of the commission of inquiry consists in deciding upon a difference of opinion between the parties

[1] Ibid., 1911, p. 104.

as to whether the dispute comes within the scope of the arbitration treaty, that is to say, whether it is justiciable in its nature by reason of being susceptible of decision by the application of the principles of law or equity. If in this case all the members of the commission, or all but one of them, agree and report that the difference is of the above-mentioned kind it shall be referred to arbitration.

Against the second duty of the commission of inquiry I have not the slightest objection to raise. But it seems to me that in the first duty of the commission there easily lies the danger that many disputes which by their nature can best be settled in a strictly legal way, thereby creating precedents for future decisions, will thenceforth be adjusted by diplomacy and by a sort of compromise—a result which cannot be justified. The proposal would be well founded only if difficult political disputes were at issue, the settlement of which by war could be prevented by the efforts of the commission of inquiry. But the activities of the British-American commission of inquiry are to extend also to those disputes the possible culmination of which in war is entirely out of the question. Under these circumstances the strictly legal settlement of disputes will be hindered by the efforts of the commission of inquiry, without any other valuable result being obtained. In this connexion it must be remembered that before the dispute is referred to the commission of inquiry diplomatic negotiations must have taken place and have produced no result. Accordingly, the commission of inquiry is in all cases dealing with disputes the diplomatic settlement of which is unusually difficult. It is precisely such disputes which call for a decision which will clear the way for the future. The report of the commission of inquiry will have the appearance of a decision upon grounds of equity and will be like

the numerous arbitral awards of the last century. Should the parties agree upon the report of the commission of inquiry, and should a similar dispute arise later in international life, we are no wiser than before and must again first go to the trouble of diplomatic negotiations and afterwards set up another commission of inquiry.

But in spite of these doubts I must insist that I do not desire the overthrow of the principle of the British-American arbitration treaty, which in the abstract is a valuable one. In my article 'The British-American Arbitration Treaty', which appeared in the third part of the *Zeitschrift für Völkerrecht und Bundesstaatsrecht* for 1912, I warmly advocated the new project.

## CHAPTER VIII

### THE PROCEEDINGS OF THE SECOND HAGUE PEACE CONFERENCE WITH REGARD TO THE JUDICIAL ARBITRATION COURT

HAVING set forth the principles involved in the recent proposals for the creation of an international judiciary, it will be useful to describe the progress of the proceedings of the Second Hague Peace Conference, chiefly in order that we may obtain an idea of the position taken by the individual states towards this important problem. The project was discussed successively by the subcommission, by the committee of examination, as well as by the Commission, and at the plenary meeting of the Conference.

### 1. THE DISCUSSION IN THE SUBCOMMISSION

At the opening of the proceedings there were laid before the Conference two proposals, one supported by Russia and the other by the United States. The first subject for consideration was whether a truly permanent court of justice was in principle desirable.

On August 1, 1907, Choate [1] made a long introductory speech before the first subcommission in favour of the United States proposal. He insisted that the new proposal did not involve a disparagement of the work of the First Hague Peace Conference.[2] He pointed out that even in

[1] p. 309.

[2] As a matter of fact the United States delegates intended in the beginning to substitute the new judicial court for the old Court of Arbitration. See Zorn, *Zeitschrift für Politik*, vol. ii, p. 350.

1899 the Court of Arbitration was regarded merely as an experiment. Only four cases had thus far been referred to the Court of Arbitration, and only one-third of the judges inscribed upon the list of the Hague Court had exercised judicial functions. Having pointed out the defects of the old Court, he passed on to speak of the fundamental principle of the new judicial court. He asserted that the new judicial court must have at least seventeen judges, who were to be appointed by all the states great and small; and that the various legal systems, languages and the great human interests must be represented upon it. Each year the judicial court must meet for a fixed period in order to settle the cases submitted to it. Apart from a special agreement to the contrary no judge was to be allowed to act in a dispute to which the state of which he was a national was a party, for a judicial court and not a mixed commission was desired. The jurisdiction of the court, he said, extended to all disputes which the parties might submit to it. The judges who, as far as possible, were to be appointed from among the members of the old Court of Arbitration, were to be allowed to be members of the commission of inquiry also or of other special arbitration courts. The American delegation, he said, did not insist absolutely upon the details of its proposal, but merely upon the principle of the establishment of a truly permanent court; the Conference would betray the interests of mankind entrusted to it, if it did not succeed in reaching an agreement upon this proposal.

After Choate had spoken, Scott,[1] the honoured technical delegate of the same country, took the floor. He cited first of all a portion of the notable address made by Root at the opening of the New York Peace Conference on

[1] pp. 313 et seq.

April 15, 1907. He pointed out that the American proposal was based upon the express instructions of the Secretary of State, while the exposition of the general principles of the project before the committee was the work of Choate. He then in like manner criticized the Court of Arbitration of 1899, and showed the necessity for and laid out the foundations of a permanent judicial court. In particular he asserted that while a long experience in the field of international politics could only be of use to the judges, yet this experience alone, as well as a training in diplomacy, could not supply for the judicial spirit which was to be looked for above all in the new judges; accordingly it was necessary to exclude diplomats from the new judicial court. Scott then set himself [1] to the difficult task of preparing the small states for their position of inferiority upon the new court. He declared with firmness that each state must have a judge upon the court, and that the principle of the equality of states should not be set aside. But although the states were equal, he said, yet there were great differences between them in so far as their material interests were concerned. He then showed that in the United States one state had more courts than another. But when he inferred from the fact that in like manner the states with a larger population must be more strongly represented upon the international court his reasoning was not conclusive. Having set forth the distinct principles which were to prevail in the composition of the new judicial court he concluded with the words: 'Through justice towards peace.'

After him the Russian jurist, Martens,[2] made a powerful and winning address in favour of a permanent judicial court. He observed that the Russian delegation had

[1] p. 317. [2] p. 321

already, in 1899, proposed a court of arbitration with a more permanent organization; but that in the spirit of friendly concession the English draft was then agreed upon. After he had set forth separately the principal features of the Russian proposal, he concluded with the following words which inspired the Conference:

> Permit me to say a few words more which come from the bottom of my heart. There have always been in history periods when great ideas dominated and led away men's minds; at one time it was religion, at another a new philosophy, and again a political idea. The Crusades are the most striking illustration of this. In all countries was heard the cry: 'To Jerusalem; God wills it.' The great idea which dominates our time is that of arbitration. When a dispute arises between nations . . . the unanimous cry has been heard since the year 1899: 'To The Hague.'

After he had spoken, Marschall,[1] in the name of Germany, de la Barra,[1] in the name of Mexico, Fry,[2] in the name of Great Britain, Larreta[2] and Drago,[3] in the name of the Argentine Republic, expressed their sympathy with the United States proposal. Drago, however, put the condition that the composition of the judicial court should correspond to the claims of the individual powers. He asserted that, in the opinion of the Argentine Republic, each state must be given a representation upon the court corresponding to its foreign commerce, because commerce and production were the best proof of the culture and of the progress of a nation. This last remark made by Drago shows that the South American states were not in the beginning opponents of the system of rotation, but first became so when an inferior apportionment was assigned to them in that system.

[1] p. 323. [2] p. 324. [3] p. 325.

On August 3, 1907, the discussions of the first sub-commission were renewed. Beernaert, a distinguished Belgian jurist of long experience in international law, honorary president of the Interparliamentary Union, and an old champion of the cause of arbitration, delivered a long address [1] against the American proposal of a permanent court. The numerous objections brought forward by him have been discussed earlier in this work. He asserted that only judges appointed by the parties themselves were in keeping with the system of arbitration; that Martens had pointed out that they must have jurists instead of diplomats, but that on the contrary it should be observed that there already existed in the form of the old Court of Arbitration a 'judicial institution', for according to the Hague Convention, disputes must be settled upon the basis of respect for law. In the four cases thus far decided, he said, distinguished judges had done excellent work; and if so few disputes had been referred to the Court of Arbitration that was the fault of the governments alone. He referred appropriately to the earlier opinions of Mérignhac and Bourgeois.

Esteva [2] next spoke in the name of the Mexican Government. He, also, expressed his approval in principle of the American proposal, but asserted that the acceptability of the new court depended upon its composition. Milovanovitch,[2] in the name of the Serbian Government, also imposed this last condition. He asserted that either the absolute equality of states must be preserved or else the plan of a representation according to states must be abandoned altogether. Further, Serbia could only find the new court necessary after an obligatory world arbitration treaty had first been entered into.

[1] p. 331. [2] p. 335.

Porras,[1] the delegate of the little American Republic of Panama, assented to the plan of a permanent court of justice in a noteworthy address. He pointed out that Panama had an interest in the decision of international disputes by judges instead of by governments; for it had more confidence in honourable judges than in a government, which at best furnishes a political settlement of the dispute instead of a legal decision. The view had often been expressed, he said, that arbitration was made use of by the great powers to meddle with the disputes of smaller states. In this respect a judicial court offered other guarantees.

Léger,[2] the delegate from Haiti, likewise advocated a permanent judicial court. He laid special stress upon the fact that the judges would possess the confidence of the powers, and proposed with that object in view that the judges should be forbidden to accept decorations or rewards from any other governments than their own. He was, moreover, more in favour of the Russian than of the United States proposal. He proposed that each state should appoint one judge; that the forty-five judges should then together choose the judicial court; and that the members thus chosen should themselves choose their successors, and should be divided into sections which should sit for longer or shorter periods. In this way the whole body of judges would never be replaced by new ones all at once, so that the constant presence upon the court of judges who had previously sat upon it would establish a tradition and would make it possible to create and to develop international law. Finally, Léger[3] proposed to entrust the judicial court with the codification of international law according to one of the numerous plans mentioned in chapter vii.

[1] p. 335. [2] p. 336. [3] p. 338.

Fortoul,[1] the representative of Venezuela, made objection to the principles in accordance with which the United States draft sought to determine the apportionment of judges. He called attention to the fact that the population, commerce, manufactures, &c., of a country were subject to change, and he advocated that the separate continents of America, Europe and Asia should each appoint an equal number of judges for the court, taking indeed into consideration the languages most widely in use.

After him Barbosa,[1] the impassioned representative of Brazil, in a long address set forth the point of view of his country. There were two distinct methods, he said, which it was absolutely necessary to separate. Obligatory arbitration could be accepted for all international disputes without the states binding themselves in any way with respect to a court before which disputes should be brought for decision; on the other hand, states might subject themselves to a judicial court and yet limit this subjection to a trifling number of cases. Thus far arbitration had always been spoken of as the sole method of the juristic settlement of international differences, and the free choice of the judges had been left to the states; it was now sought to change that. It was sought to create an international judiciary of the same kind which exists for the legal relations between private persons; yes, a further step still was advocated. Private individuals could by mutual agreement refer an affair to a court of arbitration instead of a judicial court; but in the case of states it was sought to make a judicial court obligatory. In contradiction to Porras he insisted that it was precisely sovereigns who had rendered many excellent decisions, whereas the decisions of

[1] p. 339.

arbitration courts composed of reputable jurists had often been criticized by the whole world. The establishment of a permanent court of arbitration was, he said, inconsistent with the sovereignty of states.

Karandjouloff,[1] in the name of Bulgaria, expressed himself heartily in favour of a permanent judicial court. He advocated that each state should appoint one judge, and that the judges so appointed should choose the members of the judicial court. Moreover, he did not wish to see nationals excluded from the judicial court.

Thereupon Fry [2] said a few words in reply to Beernaert. Beernaert, so Fry asserted, would be right in his opposition to the new arbitration court if it were desired to set up the new court in place of the existing one; but that was not the case; the two courts would be equally open to the use of the nations.

The Portuguese, Marquis de Soveral,[2] said that it had been asserted by Choate that the creation of a permanent judicial court was the chief work before the Conference; but that was not true; the question of an obligatory world arbitration treaty was more important.

Momtaz-es-Saltaneh,[2] the representative of Persia, voiced the adherence of his government to the new project.

Thereupon Bourgeois [3] yielded the chair of the subcommission to de Beaufort in order to speak in his character as first delegate of France. He said in particular that there was no question of suppressing the old Court of Arbitration which existed essentially for political differences, but that it was a question of creating a court of justice in the true sense of the word, which would act within a limited field, namely, that of strictly legal disputes. There were even disputes, he said, for which the Court of

[1] pp. 344 et seq. [2] p. 346. [3] p. 347.

Arbitration of 1899 was preferable, and others which would be better settled by the new judicial court; in the one case arbitrators were wanted, in the other judges. In conclusion, Bourgeois professed his adherence to modern pacifism in the following noble words:

> For centuries men believed only in the rule *si vis pacem, para bellum*, that is to say, they limited themselves to the military organization of peace. We have gone beyond that, but it is not enough for us to establish a more humane organization, I was about to say, the peaceful organization of war.[1]

Beldiman,[1] the Roumanian delegate, desired that before the proposal be referred to the committee of examination the United States should give more information as to the manner in which the seventeen judges of the judicial court were to be appointed, and he proposed that it should be expressly provided in the Convention that the states should have complete freedom to choose between the old and the new Court of Arbitration.

Castro [2] accepted the proposal in the name of Uruguay, but declared that he wished to withhold his vote until the composition of the Judicial Court was known.

Réchid Bey,[2] the Turkish representative, said that he would withhold his vote in the absence of instructions from his government.

Beldiman [2] declared that as he had received no answer to his inquiry from the delegation of the United States, he desired to abstain from voting.

A vote was thereupon taken upon the abstract question of the creation of a permanent judicial court, and although the details of the American proposal with respect to the

[1] p. 349. [2] p. 350.

manner in which the court was to be constituted were not yet known, the proposal was adopted by twenty-eight votes with twelve abstentions. The states abstaining were Austria-Hungary, Belgium, Denmark, Spain, Greece, Norway, Roumania, Serbia, Siam, Sweden, Switzerland, and Turkey.

The United States and Russian proposals were thereupon referred to committee *B* of the first subcommission.

## 2. The Discussion in Committee of Examination *B*

The committee of examination had before it at its first meeting on August 13, 1907, in addition to the Russian proposal which was not further discussed, merely a common British-German-United States proposal, which was taken as the basis for further discussion.

Choate [1] first of all pointed out once more the importance of the new project and proposed that an agreement should first be reached upon the principles and that the question of the determination of the judges should be left to the end.

Marschall [1] supported the remarks of Choate and referred to a statement made by one of the speakers that it was the fault of the governments if too few cases had been referred to the old Court of Arbitration of 1899. He did not intend, he said, to examine into the justice of that reproach; but if that was the case, it must be made as difficult as possible for governments to fall back into their old faults. Finally, he insisted that optional arbitration with an excellent court was better than obligatory arbitration necessarily limited to a small field.

[1] p. 594.

Fry [1] assented to the remarks of both speakers.

Asser [1] dwelt particularly upon the time consumed by and the cost involved in the old Court of Arbitration, and called attention to the fact that Holland also had had the intention of introducing a proposal with the object of perfecting a court of arbitration, but had abandoned the idea in view of the other proposals which went further.

Bourgeois [1] directed his remarks chiefly against the statements made by Marschall. He insisted that the chief problem before the Conference was indeed that of obligatory arbitration. Marschall had, he said, compared the new Court of Arbitration to a magnificent frame; he begged them all to put a picture into that frame.

Beldiman [2] renewed the request which he had already made in the subcommission to be informed as to the method of appointing the judges; otherwise it would be impossible to form any picture of the British-German-United States proposal.

Scott [2] promised that the composition of the new court would be made known at the next meeting.

In the subsequent discussion of the first six articles of the project there were differences of opinion as to the name of the new judicial court.[3]

Choate [4] finally declared that the name was a matter of secondary importance; when the child was once baptized, he said, it would not be its name but its deeds which would determine its career. But Bourgeois [4] thought that it was not the name only, but rather the sex of the child, which was at issue.

At the second meeting of committee *B* on August 17,

[1] p. 595.
[2] p. 596.
[3] See above, p. 125.
[4] p. 598.

1907, Lou Tseng-tsiang[1] declared in the name of China that the standing of the powers in the Universal Postal Union should be taken as the basis of the new judicial court. If China were not given due consideration, he said, his government would withhold its vote.

After the discussion of some details, Scott[2] set forth the scheme of the British-German-United States project with regard to the apportionment of judges. He said that the question of the composition of the court of justice would be a simple one if each country were to appoint one judge and the judges so appointed were to form the court; but in that case they would have a court of forty-five members, which would be no longer a 'court', but a 'judicial assembly'. He developed the factors which were to be taken into consideration in the distribution of judges, and insisted that the principle of the equality of states would not be abandoned by making distinctions of any kind in the length of tenure of the judges. In addition, he said, each nation would be at liberty to combine with other nations in order to appoint one judge in common, who would be allowed to sit for a longer period. The plan proposed was the result of long work; it was not perfect, but could well furnish a basis for discussion.

It has been shown above in chapter iv, section 5, how many years out of a period of twelve years the great powers and the other states were to be represented upon the tribunal. As is well known, the great powers are to be represented for twelve years continuously by a judge and a deputy judge, whereas the other states are to be represented for only ten years, four years, two years, and one year. The rotation according to which the medium-sized and small states were to be represented during the

[1] p. 602. [2] p. 606.

twelve years by a judge and a deputy judge was as follows:

| *First year* | *Second year* | *Third year* | *Fourth year* |
|---|---|---|---|
| 1. Argentine. | 1. Argentine. | 1. Brazil. | 1. Brazil. |
| 2. Belgium. | 2. Belgium. | 2. Chile. | 2. Chile. |
| 3. Bolivia. | 3. China. | 3. Costa Rica. | 3. Cuba. |
| 4. China. | 4. Columbia. | 4. Denmark. | 4. Denmark. |
| 5. Spain. | 5. Spain. | 5. Spain. | 5. Greece. |
| 6. Netherlands. | 6. Netherlands. | 6. Greece. | 6. Netherlands. |
| 7. Roumania. | 7. Roumania. | 7. Netherlands. | 7. Portugal. |
| 8. Sweden. | 8. Sweden. | 8. Portugal. | 8. Siam. |
| 9. Turkey. | 9. Turkey. | 9. Turkey. | 9. Turkey. |
| *Fifth year* | *Sixth year* | *Seventh year* | *Eighth year* |
| 1. San Domingo. | 1. Bulgaria. | 1. Argentine. | 1. Argentine. |
| 2. Ecuador. | 2. Spain. | 2. Belgium. | 2. Belgium. |
| 3. Spain. | 3. Guatemala. | 3. China. | 3. China. |
| 4. Mexico. | 4. Haiti. | 4. Spain. | 4. Spain. |
| 5. Norway. | 5. Luxemburg. | 5. Honduras. | 5. Nicaragua. |
| 6. Netherlands. | 6. Mexico. | 6. Netherlands. | 6. Netherlands. |
| 7. Servia. | 7. Norway. | 7. Roumania. | 7. Roumania. |
| 8. Switzerland. | 8. Persia. | 8. Sweden. | 8. Sweden. |
| 9. Turkey. | 9. Switzerland. | 9. Turkey. | 9. Turkey. |
| *Ninth year* | *Tenth year* | *Eleventh year* | *Twelfth year* |
| 1. Brazil. | 1. Brazil. | 1. Spain. | 1. Bulgaria. |
| 2. Chile. | 2. Chile. | 2. Mexico. | 2. Spain. |
| 3. Denmark. | 3. Denmark. | 3. Norway. | 3. Mexico. |
| 4. Spain. | 4. Greece. | 4. Netherlands. | 4. Montenegro. |
| 5. Greece. | 5. Paraguay. | 5. Peru. | 5. Norway. |
| 6. Panama. | 6. Netherlands. | 6. Salvador. | 6. Persia. |
| 7. Netherlands. | 7. Portugal. | 7. Servia. | 7. Switzerland. |
| 8. Portugal. | 8. Siam. | 8. Switzerland. | 8. Uruguay. |
| 9. Turkey. | 9. Turkey. | 9. Turkey. | 9. Venezuela. |

Kriege[1] thereupon gave some explanations. Each state could, he said, have its own deputy judge, but several states could combine together in order to appoint one judge and one deputy judge; likewise Belgium's judge, for example, could at the same time be Switzerland's deputy

[1] p. 613.

judge, and Switzerland's judge could be Belgium's deputy judge; the table might even designate the states whose judges, in case of need, were to act as the deputy judges of other states.

Barbosa [1] observed that it had been agreed that the discussion of the scheme of rotation should not take place until forty-eight hours after the table had been distributed, and yet the discussion had already begun. But Bourgeois [1] insisted that the agreement had not been violated.

After Lou Tseng-tsiang [1] had next pointed out in the name of China that in the apportionment of judges due consideration had not been given to the population of that country, the discussion was confined to the details of the project.

At the third meeting of the committee on August 20, 1907, Barbosa [2] spoke with great vehemence against the system of rotation and introduced as an offset to it the proposal of Brazil above described.[3] He demanded that the British-German-United States proposal should be brought before the subcommission for discussion, because it set aside the principle of the equality of states expressly adopted by the First Hague Peace Conference, and the committee was not authorized to make such a project the basis of its deliberations.

Beldiman [4] and Fry [4] likewise said that the committee was not competent to pass upon a new proposal, while Nelidow, Marschall, Martens, and Choate [4] were of the opposite opinion and desired to see the question settled by reference to the precedents in the committee of 1899. Choate [4] and Scott [5] contradicted the assertion made by

[1] p. 613. [2] p. 618. [3] See pp. 72 et seq
[4] p. 623. [5] p. 624.

Barbosa that the United States proposal was inconsistent with the equality of states.

Barbosa [1] did not desire to insist absolutely upon his point that the affair should be referred to the subcommission. He said that he knew well what were the views of the majority of the committee. Nevertheless, he once more supported his point of view in an elaborate address. He remarked with great irony that persons thought they were acting in accordance with the principle of equality of states when one state was represented for twelve years, another for ten, four, and one year upon the court; why were the poor South American states not given a judge for only twenty-four hours? Was not the difference between twelve years and twenty-four hours a small one? It was a question, he said, of the practical application of the principle of the equality of states, and the present system ran diametrically contrary to it. A distinction should be made between the two different rights, that of appointing and that of sitting. In the right of appointment all the states were fully equal. But in the right of sitting upon the court there was an absolute inequality; and it was this very inequality to which he was opposed.

After Bourgeois and Scott [2] had once more spoken in favour of the competency of the committee, details of the project were taken up and passed upon.

At the next meeting of the committee on August 24, 1907, the Persian delegate, Momtaz-es-Saltaneh,[3] protested that his country, which could look back upon a glorious past of a thousand years, had been degraded to the rank of a power of the fourth class. The Conference had met, he said, with the object of securing the triumph of right, not of might, and Persia would vote against the project because it

[1] p. 624. [2] p. 627. [3] p. 632.

violated the principle of the equality of states. The rest of the meeting was taken up with discussions over particular points of the draft.

At the opening of the fifth meeting of the committee on August 27, 1907, Barbosa[1] vigorously renewed his attack upon the system of rotation. He declared that it did away with the principle of the equality of states, which alone up to that time had been the 'last check upon the ambition and the pride of nations' and which had been expressly confirmed by the First Hague Conference. The British-German-United States proposal embodied nothing but injustice; it degraded the South and Central American states to powers of the third, fourth, and fifth class. If Europe and the United States, he said, had a better knowledge of his continent they would not have made such a proposal; the South American states had in no way arrived at the end of their development, but were in the prime of their strength and had a great future before them. Brazil was, he said, a sovereign state, and would have nothing to do with the grades proposed by the system of rotation. Root had once said at the Third Pan American Congress that the United States regarded the rights of the smallest and weakest states as equal with those of the strongest nations. Now was the opportunity, he said, to put that principle into practice. If it were violated, the cause of peace would not be advanced. It was true that some states were weaker than others, but was not that all the more reason for protecting the weak against the strong? Disputes between the great powers were rare; it generally happened that differences arose between small and large states. The whole project was arbitrary, he said; a new court was unnecessary, and the committee should confine its

[1] pp. 643 et seq.

efforts to improving the old court. The number of judges was first fixed arbitrarily at seventeen, and now it was sought to adjust the sovereignty of states to that number, instead of starting out with the equality of states and determining the number of judges upon that basis. Moreover, judicial settlement and arbitration were being confused with each other; in international life arbitration was the only possible method; for judicial settlement presupposed a superior authority. The Brazilian draft, he said, unlike that of the United States, was in keeping with the principles of international law.

Esteva [1] protested in the name of Mexico against the draft, which he said violated the principle of the equality of states. The discussion was then given over to details.

At the sixth meeting of the committee on September 2, 1907, the project was merely discussed in its details. The fundamental significance of the proposal was touched upon only once by Barbosa,[2] when Lammasch brought up the question of the name of the new court.

At the seventh meeting of the committee, on September 5, 1907, the greater part of the discussion was likewise taken up with details of the draft; it was only at the end that Choate [3] and Barbosa [4] delivered lengthy addresses. Choate appealed to the good-will of the committee, gave a review of all the proposals thus far made with regard to the composition of the judicial court, and expressed the hope that an agreement would be reached upon some basis or other. Barbosa replied to the attacks which the Brazilian proposal had met with from the press.

The committee then appointed a subcommittee consist-

[1] p. 650.
[2] p. 658. The greater part of his address has been given above, p. 121.
[3] p. 683.
[4] p. 687.

ing of Bourgeois, as president, Nelidow, Tornielli, Choate, Marschall, Barbosa, Fry, and Mérey,[1] in order to reach an agreement upon the question of the composition of the judicial court.

At the eighth (final) meeting of committee *B* the delegates of Roumania, Belgium, Mexico, Greece, and Brazil [2] declared that Choate had asserted at the last meeting that the committee had unanimously declared itself in favour of the new court of arbitration; that this was not at all the case, since they had as a body withheld their assent.

Nelidow [2] thereupon presented a report upon the work of the subcommittee. He said that the British-German-United States project had received no support, and the system of rotation had accordingly been dropped; that a new system had thereupon been proposed according to which the members of the Court of Arbitration of 1899 were to choose from among themselves fifteen to seventeen judges; that the objection had been made that the members of the old Court of Arbitration were not exclusively jurists, and accordingly did not offer the necessary guarantees for a proper selection. It had also been proposed, he said, that each government should appoint four candidates, and that out of the list thus composed the members of the old Court of Arbitration of 1899 should make their choice; but that it had been objected that this selection would be too complicated, and would leave it to the states to appoint the members of the new judicial court. It was, therefore, impossible to submit a proposal to the committee.

Barbosa [3] then declared that the Brazilian Government did not see the necessity of a new court of arbitration; but that if it was desired to create one the principle of the equality of states must be secured; that this had only

[1] pp. 688, 694. [2] p. 694. [3] p. 695.

been done in the Brazilian proposal; and that those proposals which were consistent with the principle of the equality of states did not take into consideration that it was essential to arbitration that the states themselves, and not a third body, should appoint the judges. So long as his statements were not refuted, he said, he must in the name of Brazil withhold his approval.

Fry [1] thought that an agreement upon the composition of the court was impossible, and proposed a resolution according to which the Conference was to declare it desirable that the powers should accept the project submitted to them without the insertion of any provision as to the appointment of the judges.

Choate,[1] however, declared that there was no reason for despair; perhaps an agreement might yet be reached; he regretted that Barbosa rejected every other project but the Brazilian one. It must be borne in mind, he said, that it was necessary to create something new; he for his part considered the system of rotation the best one; the fears of the small states were, he thought, not justifiable; he wanted, however, to meet all objections, and now offered a proposal which would certainly meet with general approval. Each state was to appoint one judge and one deputy judge of any nationality; the list thus made up was to be communicated by the International Bureau to the states; thereupon each state was to communicate to the Bureau the names of the fifteen judges and fifteen deputy judges whom it desired to have appointed; those judges who received the most votes were to be regarded as elected; if a vacancy should occur, the state which had chosen the judge should appoint the new one.

Barbosa [2] replied in a long address that he did not insist

[1] p. 697. [2] p. 699.

absolutely upon the adoption of the Brazilian proposal, but that he could not accept any project which did not embody the principle which he had so often explained. As for the resolution proposed by Fry, he could not, he said, assent to it; if the Conference could not agree upon the basis of a new court of arbitration, the proposal had failed; it was not correct to assert that the Conference would disappoint the world if it did not create the court of arbitration; for the world was not expecting such a court; in the programme of the Conference no mention was made of the establishment of a new court of arbitration, but merely of improvements to be made in the old Arbitration Court of 1899.

Nelidow [1] thought that he could not wholly agree with Choate when the latter said that something new must be created; the truth was, he said, that something good should be created or nothing at all. At this Conference they had not succeeded in reaching an agreement upon the new court of arbitration, and there was nothing else left to do but to agree upon Fry's proposal.

Asser [1] declared that the Dutch delegation had had from the start a proposal of its own, but that it had not brought it forward because a great number of other projects had been introduced; as these projects appeared to have failed, the Dutch delegation reserved the right to introduce its proposal subsequently.

Bourgeois,[1] the president of the committee, declared that they had two proposals before them, that of Choate and that of Fry. He asked Barbosa whether he insisted upon his proposal.

Barbosa [1] answered that he had no interest in having his proposal adopted; he had merely wished to indicate in his draft how a permanent court of arbitration could be erected without violating the principle of the equality of

[1] p. 702.

states. He placed no value, he said, upon the creation of a new court of arbitration; he concluded, moreover, that the principle of the equality of states which he had fought for had been recognized by the Conference, since the system of rotation had been rejected on all sides.

Bourgeois [1] then proposed that Choate's proposal should first be voted upon, and he reminded the committee of the great responsibility which it was under towards the Commission.

After some remarks upon the form of the draft the votes were cast.[2] Five powers—United States, France, Greece, Netherlands, and Peru—voted for the proposal.

Nine powers—Germany, Austria-Hungary, Belgium, Brazil, Great Britain, Italy, Portugal, Roumania, and Russia—voted against it.

Choate [2] expressed his regret over the rejection of his proposal.

After further debate, Fry's proposal was voted upon.[3]

Eight states—Netherlands, Germany, Great Britain, United States, Italy, Portugal, Russia, and France—voted in favour of it.

Five powers—Greece, Peru, Brazil, Roumania, and Belgium—voted against it.

Austria-Hungary and Luxemburg refrained from voting.

Fry's proposal was accordingly adopted.

### 3. The Discussion in the Commission and in the Plenary Session

Scott was appointed to report upon the work of the sub-commission concerning the court of arbitral justice. On October 9, 1907, the First Commission discussed the report presented by Scott.

[1] p. 703. [2] p. 704. [3] p. 707.

Esteva[1] first of all declared in the name of Mexico that he adopted Fry's proposal now that Articles 6, 7, and 8 of the British-German-United States proposal, which were inconsistent with the principle of the equality of states, had been eliminated.

Carlin,[2] the Swiss delegate, set forth the reasons why he could not accept Fry's proposal. He said that although the principle of the equality of states was, indeed, not violated by it, yet the fundamental principle of arbitration, namely, the free choice of the judges by the states in each individual case, was violated by it. Even if the old Court of Arbitration remained in existence, still the new court would obtain the upper hand, and moral pressure would be exercised upon the states to refer their disputes to it, and the most important feature of arbitration, the free choice of judges, would be lost to the states.

Henriquez i Carvajal[3] expressed in the name of San Domingo his approval of Fry's proposal.

Brun[4] declared in the name of Denmark that he must vote against the proposal, since it violated the most essential characteristic of arbitration, the free choice of judges.

Barbosa[5] then delivered the longest of the addresses which he made before the Conference upon the question of the Judicial Arbitration Court. He said that his government would in the spirit of friendly understanding vote in favour of the proposal. He then once more gave in great detail the reasons for his previous opposition. He recalled the rôle which Brazil had played up to that time in the matter of arbitration. Nationals of Brazil, he said, had often been appointed as arbitrators in important cases; for example, in the *Alabama* dispute.

[1] p. 144. [2] p. 145. [3] p. 146. [4] p. 147. [5] p. 148.

In 1870, 1871, 1880, and 1884 Germany and Italy had each appointed a Brazilian national as arbitrator once, and France, Great Britain, and the United States each twice; the South American states could not be pushed aside as it had been attempted to do at the Conference. Moreover, it was not only these states which rejected the British-German-United States proposal, but the great powers as well. At the last meeting of the subcommittee even Germany and Great Britain had abandoned the system of rotation. It was entirely unfair, he said, to say that the smaller states had caused the failure of the most important projects; on the contrary, it was the opposition of the great powers which had prevented an agreement upon the questions of capture at sea, contraband of war, blockade, and obligatory arbitration. The South American states were entirely willing to co-operate with the projects looking to peace. Japan had entered into the European concert some years before through the gate of war, whereas South America now appeared to be entering into it through the gate of peace.

Ordoñez [1] declared in the name of Uruguay that he desired to withhold his vote. He said that the free choice of judges was the only method consistent with the nature of arbitration.

Machado,[2] in the name of Guatemala, expressed his adherence to the statements made by Barbosa; he too pointed out the development of the South American states and protested against the statements made by the press, which, he said, greatly under-estimated the South American states in asserting that the great powers could not let their disputes be decided by judges from Brazil, Guatemala, &c.

Hagerup [3] voted for Fry's proposal and declared that

[1] p. 156. [2] p. 158. [3] p. 159.

the principle of the equality of states was a fundamental principle of international law.

Guillaume and Beldiman,[1] in the name of Belgium and of Serbia, rejected the proposal as inconsistent with the fundamental principles of arbitration.

Martens [1] observed that the Russian proposal had not yet been withdrawn.

Lou Tseng-tsiang and Momtaz-es-Saltaneh [1] declared in the name of China and of Persia that they desired to vote for the British proposal, but that they entered a solemn protest against any attempt to set aside the principle of the equality of states.

At the next meeting of the Commission on October 10, 1907, Beldiman [2] explained the reasons for the attitude of Serbia towards the British proposal. He further attacked a remark made by Scott that the Peace Palace had been built, so that it was only necessary for the judges to take their seats within it. The palace had not at all been built, he said, since no agreement had been reached upon the fundamental question, the constitution of the court.

Corragioni d'Orelli [3] declared himself in favour of the British proposal, as did also Matte,[3] the representative of Chile. The latter directed a forcible attack against the overthrow of the principle of the equality of states.

Thereupon the President of the Second Conference, the Russian Ambassador Nelidow,[4] exhorted the delegates to unite in a spirit of friendly understanding upon the British proposal. The Conference greeted his words with applause.

Hudicourt,[5] in the name of Haiti, voted for the proposal after he had obtained an assurance from Scott that the clause 'based upon the equality of states', which by

[1] p. 160. [2] p. 178. [3] p. 180.
[4] p. 181. [5] p. 182.

a mistake on the part of the printer had been introduced in the original draft of the proposal, had not been left out because the principle had been abandoned.

Fortoul and Carvajal,[1] in the name of Venezuela and of San Domingo, announced that they withheld their votes.

Rangabé [1] declared in the name of Greece that he withheld his vote, since an agreement had not been reached upon the most important points.

A vote was then taken upon the draft. Thirty-seven states voted for it; Belgium, Roumania, and Switzerland voted against it. There were four abstentions: Denmark, Greece, Uruguay, and Venezuela. The proposal was accordingly adopted.[2]

A discussion then followed as to whether Fry's proposal should be given the name of a *vœu* or a 'resolution'. Count Tornielli [3] declared that in accordance with the earlier attitude of the governments unanimity was not necessary in the case of a *vœu*, but was necessary in the case of a 'resolution'. Accordingly, in the present case the first term must be preferred.

At the plenary meeting of the Conference, on October 16, 1907, Scott,[4] in presenting his report, recommended the adoption of the *vœu*. Thereupon certain states had it recorded in the minutes of the meeting that they would vote for the *vœu* only upon the express condition that the principle of the equality of states would not be violated in the subsequent erection of the court.

A vote was finally taken upon Fry's proposal, which read as follows:

> The Conference calls the attention of the signatory powers to the advisability of adopting the annexed draft

[1] p. 182. [2] p. 189. [3] p. 190.
[4] Vol. i, p. 332.

Convention for the creation of a Judicial Arbitration Court, and of bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the court.

Thirty-eight states voted for the *vœu*, while six refrained from voting, namely, Belgium, Denmark, Greece, Roumania, Switzerland, Uruguay. Accordingly, the *vœu* was adopted by the Conference.

## CHAPTER IX

### COMMENTARY UPON THE DRAFT CONVENTION OF THE SECOND HAGUE PEACE CONFERENCE RELATIVE TO THE JUDICIAL ARBITRATION COURT

In the preceding chapters we have merely been able to discuss the leading principles which, in our opinion, are involved in the new Judicial Court. It may also be of interest, however, to learn the details of the new project as they were laid down by the Second Hague Peace Conference. The best method of doing this seems to me to present a brief commentary upon the draft convention of the Second Hague Peace Conference. In doing so I shall keep closely to Scott's report, but avoid as far as possible the repetition of points already discussed above.

ANNEXE AU I[er] VŒU ÉMIS PAR LA DEUXIÈME CONFÉRENCE DE LA PAIX

*Projet d'une Convention relative à l'établissement d'une Cour de Justice arbitrale*

Titre I[er]. Organisation de la Cour de Justice arbitrale

Article 1[er]

Dans le but de faire progresser la cause de l'arbitrage, les puissances contractantes conviennent d'organiser, sans porter atteinte à la cour permanente d'arbitrage, une Cour de justice arbitrale,

ANNEX TO THE FIRST VŒU EXPRESSED BY THE SECOND PEACE CONFERENCE

*Draft Convention relative to the creation of a Judicial Arbitration Court*

Part I. Constitution of the Judicial Arbitration Court

Article 1

With a view to promoting the cause of arbitration, the contracting powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Judicial Arbitration Court,

d'un accès libre et facile, réunissant des juges représentant les divers systèmes juridiques du monde, et capable d'assurer la continuité de la jurisprudence arbitrale.

of free and easy access, composed of judges representing the various juridical systems of the world, and capable of ensuring continuity in arbitral jurisprudence.

The Convention, in truth, has in view not the advancement of arbitration, but merely the judicial settlement of international disputes, as was pointed out above. But in order to meet the unfounded fears of certain states the Convention retains the expression, 'arbitration court'.

The Convention has two objects in view: the advancement of arbitration and the securing of the continuity of judicial decisions. For the fulfilment of this second duty two conditions, in Scott's opinion, appear to be necessary: the permanence of the tribunal and the representation upon it of the various legal systems. We have seen above that this second condition hardly possesses the great importance attached to it by Scott, because we would like to see cases of international private law referred to a special court, that is, to a special chamber. A series of cases would thus be withdrawn from the jurisdiction of the international court.[1] But Scott is correct when he points out that an international interpretation of treaties must be substituted for the mainly national interpretation thus far given.[2] Yet this will happen of itself if nationals of the various states are represented upon the court. There is no need for that purpose to make a special selection according to nationalities.

The new court is to sit side by side with the old Court of Arbitration of 1899. The text first read: 'To erect a Judicial Arbitration Court side by side with the old

[1] See in this connexion Meili, *Das internationale Zivilprozessrecht auf Grund der Theorie, Gesetzgebung und Praxis*, Zürich, 1904, pt. 2, p. 290.

[2] See also Oppenheim, *Die Zukunft des Völkerrechts*, p. 38.

Court of Arbitration.' Bourgeois [1] objected to these words because, he said, the impression would be given that the old and the new courts were entirely independent of each other, whereas on the contrary it should be pointed out that there existed a common bond between the two. Upon motion of Mérey [2] the following words were substituted: 'Without altering the status of the Permanent Court of Arbitration.'

The Judicial Court is to be 'of free and easy access'. The text at first read: 'Easy of access and free of charge.' By the expression 'free of charge' it was meant that only the resort to the court should be free, and that the honoraria of the counsel, &c., should be borne by the parties.[3] Martens [4] thought that this expression was not clear enough. In consequence the present wording was adopted. According to the article the costs of the decision are to be borne by the contracting states, not by the parties to the particular case, since the court exists in the interest of the states as a body.

| Article 2 | Article 2 |
| --- | --- |
| La Cour de justice arbitrale se compose de juges et de juges suppléants choisis parmi les personnes jouissant de la plus haute considération morale et qui tous devront remplir les conditions requises, dans leurs pays respectifs, pour l'admission dans la haute magistrature, ou être des jurisconsultes d'une compétence notoire en matière de droit international. | The Judicial Arbitration Court is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of international law. |

[1] p. 598. [2] p. 661. [3] p. 596. [4] p. 657.

| | |
|---|---|
| Les juges et les juges suppléants de la Cour sont choisis, autant que possible, parmi les membres de la Cour permanente d'arbitrage. Le choix sera fait dans les six mois qui suivront la ratification de la présente Convention. | The judges and deputy judges of the Court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention. |

The first paragraph of this article secures the exclusion of diplomats and the presence upon the court of true jurists only. Kriege [1] desired that only those judges should be appointed who had fulfilled the conditions requisite for admission to the highest judicial offices of their own states. He said that in many countries the conditions for admission to the lowest judicial offices were trifling, and that not even university work was always required. But the delegates hesitated to adopt this proposal, because to do so would be to exclude many distinguished jurists from a seat upon the court. Martens [2] proposed that the governments should make a definite declaration to the International Bureau concerning the qualifications of the judges appointed by them. Nelidow agreed to this proposal. But in order to avoid any hurt feelings, the wording of the text was agreed upon. According to this, the capacity to hold the highest judicial offices within the state is demanded as a general rule, but at the same time an acknowledged experience in the field of international law is sufficient.[3] The important point is, as Scott well observed, not the title, but the character and personality of the judges.[4]

With regard to the words 'as far as possible' in the

[1] p. 661.

[2] p. 662.

[3] See p. 71 of my commentary upon the Convention for the pacific settlement of international disputes.

[4] See Schücking, op. cit., p. 91.

second paragraph, a discussion took place at the first meeting of the committee.[1] Barbosa said that it was inconsistent with a convention to insert in it any other obligation than a legal one, and pointed out that nothing more than a wish was expressed in the words 'as far as possible' in the second paragraph. Hence it would be better to say 'may be chosen'. This suggestion, however, was not taken up, and the discussion merely turned upon the point whether the states should have complete freedom with respect to the choice of judges, as Fry proposed, or not. Bourgeois urged in favour of the latter rule above all the fact that in this way a connexion would be established between the two courts. He desired, he said, that the judges of the new court should not only be appointed from among the members, but also by the members, of the old Court of Arbitration of 1899. Asser thought that if the states were to be obliged to appoint the judges from the list of the Permanent Court the powers should be permitted to put five persons instead of four upon the list. But Choate and Bourgeois regarded this number as too great. The latter thought, moreover, that a clause could be inserted to the effect that the judges might be freely chosen in case suitable judges could not be obtained from the list of the Hague Court of Arbitration. But Howard[2] thought that this would be a reflection upon the members of the old Court of Arbitration. Baron Marschall declared that he was in favour of the appointment of the judges from among the members of the old Court of Arbitration. The question was then referred to a drafting committee, which adopted the orginal phrasing, so that the connexion is clearly expressed between the new Judicial Court and the old Court of Arbitration.

[1] p. 599. [2] p. 600.

Attention was called to the fact that in the second paragraph of this article and in subsequent articles the new court is repeatedly termed a 'judicial court'. Likewise 'judges' and 'deputy judges' are spoken of instead of 'arbitrators'.

| Article 3 | Article 3 |
| --- | --- |
| Les juges et les juges suppléants sont nommés pour une période de douze ans à compter de la date où la nomination aura été notifiée au Conseil administratif institué par la Convention pour le règlement pacifique des conflits internationaux. Leur mandat peut être renouvelé. | The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention for the pacific settlement of international disputes. Their appointments can be renewed. |
| En cas de décès ou de démission d'un juge ou d'un juge suppléant, il est pourvu à son remplacement selon le mode fixé pour sa nomination. Dans ce cas, la nomination est faite pour une nouvelle période de douze ans. | Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years. |

Underlying the first paragraph is the idea that the regularity and continuity of judicial decisions must be secured. But this can only be when the period during which the individual judges exercise their functions is not too brief. Only then can the experience obtained by the judges be of advantage to the community of states. With this idea particularly in view, it was provided that a judge might be reappointed, thus making it possible for him to sit for a period exceeding twelve years.

Whereas the names of the members of the Court of

Arbitration of 1899 were notified to the International Bureau, the names of the judges of the new Judicial Court are notified to the Administrative Council, which is composed of the diplomatic representatives of the contracting powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who acts as president.[1] This distinction was made on the ground that the appointment of a judge to the new Judicial Court was a more important affair than the designation of a person upon the list of the old Permanent Court, since in the latter case nothing more was created than the possibility of the exercise of judicial functions; and also upon the ground that the International Bureau is strictly a bureau, whereas the Administrative Council is diplomatic in character.

Paragraph 2 is analogous to Article 44, paragraphs 7 and 59, of the Convention for the pacific settlement of international disputes. The attempt was made at first to secure that the judges be irremovable by providing that the reasons for their recall should be given, but it did not succeed. Mérey[2] in particular had demanded every guarantee in that respect; but Kriege[2] answered that this principle had already been recognized in the provision that the length of judicial tenure should be a period of twelve years, but that a judge could nevertheless be recalled by his country for special reasons, namely, those reasons which were provided for in the domestic legislation of his country. To formulate general rules in this respect would be difficult, he said. Renault also[2] pointed out that each new appointment of a government and the recall of a judge was valid from an international point of view, and that the powers

[1] See Article 49 of the Convention for the pacific settlement of international disputes.

[2] p. 667.

were morally obligated not to remove judges without justifying reasons. Nevertheless Mérey[1] insisted that it should be laid down as a principle that the judges were not subject to removal, and Martens agreed with him. But Mérey's proposal was rejected, as was that of Marschall,[1] according to which the states were to communicate to the other states the grounds for the removal of a given judge. Likewise Choate's proposal[2] that the judges should only be removed in case of permanent physical incapacity found no support.

The recall of the judges is accordingly left to the good faith of the states. If a judge is recalled, the decision in which he has taken part is in every case valid.

| Article 4 | Article 4 |
| --- | --- |
| Les juges de la Cour de justice arbitrale sont égaux entre eux et prennent rang d'après la date de la notification de leur nomination. La préséance appartient au plus âgé, au cas où la date est la même. | The judges of the Judicial Arbitration Court are equal, and rank according to the date on which their appointment was notified. The judge who is senior in point of age takes precedence when the date of notification is the same. |
| Les juges suppléants sont, dans l'exercice de leurs fonctions, assimilés aux juges titulaires. Toutefois, ils prennent rang après ceux-ci. | The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter. |

These provisions were made very precise in order to avoid any differences of interpretation.

The last sentence of the first paragraph is of importance in connexion with Article 26, paragraph 1.

[1] p. 668. [2] p. 669.

| Article 5 | Article 5 |
| --- | --- |
| Les juges jouissent des privilèges et immunités diplomatiques dans l'exercice de leurs fonctions et en dehors de leurs pays. | The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country. |
| Avant de prendre possession de leur siège, les juges et les juges suppléants doivent, devant le Conseil administratif, prêter serment ou faire une affirmation solennelle d'exercer leurs fonctions avec impartialité et en toute conscience. | Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously. |

The first paragraph of Article 5 corresponds to Article 46, paragraph 4, of the Convention for the pacific settlement of international disputes.[1] The words 'outside their own country' provide for the case in which a state should appoint a national of another state as judge. Such a judge would naturally not enjoy diplomatic privileges in his own country.

Consideration is made for the fact that many judges might refuse to take an oath because they considered that act as inconsistent with their religious convictions. For this reason a solemn affirmation is made equivalent to an oath. This arrangement was not made, however, without a struggle. Many desired that an oath should be made under all circumstances. Kriege[2] declared that an oath bound in a special way the conscience of the one taking it, and accordingly that particular form must be chosen. The provision of the text was advocated in particular by Martens.

[1] See p. 83 of my commentary upon this Convention.

[2] p. 614.

De Beaufort [1] proposed that it should be provided that the judges should take an oath that they had received no remuneration from private persons, because Article 10 makes mention only of remuneration from governments. But it was thought that such a provision would be offensive.

The Administrative Council must put it on record that the oath has been taken or the solemn affirmation made.

In response to an inquiry made by Eyschen [2] it was unanimously agreed that the members of the new Judicial Court were under obligation to exercise the duties of their office. 'They must sit except in cases where they are legally excused,' said Bourgeois.[2] The contrary rule holds good for the judges of the Permanent Court of Arbitration of 1899.[3]

Article 6

La Cour désigne annuellement trois juges qui forment une délégation spéciale et trois autres destinés à les remplacer en cas d'empêchement. Ils peuvent être réélus. L'élection se fait au scrutin de liste. Sont considérés comme élus ceux qui réunissent le plus grand nombre de voix. La délégation élit elle-même son président, qui, à défaut d'une majorité, est désigné par le sort.

Un membre de la délégation ne peut exercer ses fonctions quand la puissance qui l'a nommé, ou dont il est le national, est une des parties.

Article 6

The Court annually nominates three judges to form a special delegation, and three more to replace them should the necessity arise. They may be re-elected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation cannot exercise his duties when the power which appointed him, or of which he is a national, is one of the parties.

[1] p. 615.

[2] p. 637.

[3] See p. 71 of my commentary upon the Convention for the pacific settlement of international disputes.

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| Les membres de la délégation terminent les affaires qui leur ont été soumises, même au cas où la période pour laquelle ils ont été nommés juges serait expirée. | The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired. |

In place of the word 'delegation' the word 'committee' was first used in the text. Martens [1] objected to this term on the ground that it was too weak an expression in consideration of the work to be done by the delegation. He said that in no other country except Great Britain would the name 'committee' be conferred upon a body performing legal functions. He proposed the expression 'permanent arbitral tribunal', and observed that the committee had not only the duty of deciding disputes, but also that of calling together the judicial court. Later on Kriege [2] thought that the expression 'special commission' might be selected, as this name is also adopted in the Prize Court Convention. An agreement seemed to be reached upon this term at first. But Martens [3] disliked this expression as well and proposed 'special tribunal'. Thereupon Crowe [3] called attention to the fact that this expression was already employed in the Peace Convention of 1899. As a result the term 'delegation' was selected. Against the use of the word 'tribunal' was the fact that it would give the appearance that there were in reality two judicial courts, whereas the delegation is only a body of judges taken from the court as a whole.

Paragraph 2 of the article expressly excludes national judges from the delegation.[4] The effort was made, so Scott says in his report,[5] to prevent the delegation from becoming arbitral rather than judicial in character.

[1] p. 616. [2] p. 634. [3] p. 664.
[4] See my remarks on p. 75 of my commentary. [5] Vol. i, p. 365.

Paragraph 3 makes it possible for two delegations to be in session at the same time. It would evidently delay the settlement of a case if the members of the delegation after the expiration of a year could not bring to an end suits begun during their term, but would be obliged to turn them over to a new delegation. If the judges exercise their functions professionally cases will for the most part not last very long, and the delegation of the preceding year will accordingly bring to an end as quickly as possible cases which have begun under them.

Asser [1] thought it better that the election should not take place every year, but only every second year. International cases, he said, often last a long time, and in addition distinguished jurists would not readily give up the work of their permanent profession, if they were members of the Judicial Court for only one year. But Kriege [1] thought differently, holding that it was precisely the short term of their commission which would induce many respected jurists to accept it. Under the present method, he said, jurists could easily be reappointed, and it was, moreover, possible to remove incapable persons at the end of a year.

Concerning the jurisdiction of the delegation see Articles 18 and 19.

| Article 7 | Article 7 |
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| L'exercice des fonctions judiciaires est interdit au juge dans les affaires au sujet desquelles il aura, à un titre quelconque, concouru à la décision d'un tribunal national, d'un tribunal d'arbitrage ou d'une commission | A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has |

[1] p. 665.

d'enquête, ou figuré dans l'instance comme conseil ou avocat d'une partie.

Aucun juge ne peut intervenir comme agent ou comme avocat devant la Cour de justice arbitrale ou la Cour permanente d'arbitrage, devant un tribunal spécial d'arbitrage ou une commission d'enquête, ni y agir pour une partie en quelque qualité que ce soit, pendant toute la durée de son mandat.

figured in the suit as counsel or advocate for one of the parties.

A judge cannot act as agent or advocate before the Judicial Arbitration Court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

This article aims at securing the impartiality of the judges. In the cases mentioned in Article 7 the mere possibility that such a judge is not impartial is sufficient to call for a positive prohibition. Even if a judge has the best will to decide fairly in such matters, that is not enough to secure a satisfactory result. The very effort of the judge to be entirely fair in such cases will often be prejudicial to the parties.

On account of the close connexion between the old Court of Arbitration of 1899 and the new Judicial Court the judges are forbidden to act as advocates not only before the new Court but also before the Court of Arbitration.

Nay, the article goes even further and has extended this prohibition even to acting as advocate before special arbitration courts and commissions of inquiry, because the duties of an advocate, as Scott says in his report,[1] are not consistent with the equanimity and dignity of a judge. This provision is preferable to the one in Article 62, paragraph 3 of the Convention for the pacific settlement of international disputes.

[1] Vol. i, p. 366.

In order to meet all possible cases it is even provided that a judge is disqualified if he has previously acted for one of the parties under the specified conditions. In this way, contrary to the provision of the Convention for the pacific settlement of international disputes,[1] a judge is forbidden to furnish legal opinions or give advice to either of the parties.

Great Britain and the United States at first advocated that nationals of the parties should not be allowed to sit upon the Court; just as they are excluded from the delegation so they should be excluded from the deliberations of the Court itself. But Marschall[2] was opposed to this, because he expected greater impartiality from the presence of national judges. He said that a distinction must be made between national courts of justice and international courts of arbitration: in national courts in no instance can one be a judge in his own case, whereas in international arbitration this may well happen. Choate and Fry[3] said that they could not agree with this view, but that they would yield in a spirit of friendly concession.

In his excellent report,[4] Scott offered the following reasons in explanation of the non-exclusion of national judges: in a small court, he said, the presence of national judges might arouse a suspicion of partiality; in such cases it is to be feared that each national judge will win over the umpire to his side. But in a large court it is impossible that the few national judges should win over the whole body, and there are not the same objections to admitting to the court judges who are nationals of the parties. Moreover, disputes will be referred to the new Court, he said, in accordance with general or special arbitration treaties;

[1] See my commentary, p. 119.
[2] p. 604.
[3] p. 605.
[4] Vol. i, p. 367.

now the free choice of judges was a characteristic of arbitration; accordingly the parties should not be limited in the exercise of this freedom of choice. This last reason is not at all conclusive. In any case a dispute would be submitted to the new court in accordance with a general or special arbitration treaty, since a direct right of action is not granted; but we should not let it escape our attention that we are dealing here with an institution which is a cross between a judicial and an arbitral court. Now, since the object of the whole Convention is the furtherance of judicial settlement and the repudiation of arbitration, it is hard to understand how the presence of national judges upon the court can be justified by the principles of arbitration when the Convention seeks to get rid of that very method of procedure.

Scott[1] advances the following additional reasons in favour of the presence of national judges: the parties have a greater assurance that the decision will not contain any offensive expressions; finally, the decision has not only for its object, he said, the settlement of the dispute, but also the development of international law; and in this last work national judges could not be forbidden to co-operate. This last observation does not take into consideration that the settlement of a dispute and the development of international law are closely connected, so that a judge who has any interest in the result of the case would seem in this respect unsuited to develop international law.

Unfortunately the Conference neglected to decide the question as to what would happen if by the system of rotation only one party were represented upon the Court. Was the other party in this case, as it was originally

[1] Vol. i, p. 368.

intended, to be allowed to appoint a representative of its own? Asser [1] called attention to the case in which more than two parties should come before the Court. Should each be then allowed to appoint a national judge? In answer Marschall [2] said that if *A* were the plaintiff and *B*, *C*, and *D* the defendants, *B*, *C*, and *D* would have to agree together upon the appointment of one judge.[3]

Asser [4] also desired to know what would happen if *B*, *C*, and *D* already had each a representative upon the Court. Kriege answered evasively that this question could not be specially regulated in the Convention, because otherwise the composition of the Court would be too complicated.

Should the national judge in such cases be appointed *ad hoc* if the parties were at the time not represented upon the Court by a judge? This question, which was raised by Asser, was answered by Bourgeois and Marschall [2] to the effect that the judge appointed by the parties in question would sit upon the Court even if by the system of rotation he was not at the time a member of it.

All these questions were left undecided in the article. Accordingly it is to be assumed that the system of rotation is to be introduced, no matter what hardships result from it.

| Article 8 | Article 8 |
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| La Cour élit son président et son vice-président à la majorité absolue des suffrages exprimés. Après deux tours de scrutin, l'élection se fait à la majorité relative et, en cas de partage des voix, le sort décide. | The Court elects its president and vice-president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are even, by lot. |

[1] p. 605. [2] p. 606.

[3] See p. 75 of my commentary upon the Convention for the pacific settlement of international disputes. [4] p. 663.

As the appointment of the chief dignitaries is of great importance, it was regulated in detail. Bourgeois, Martens, and Crowe[1] had advocated that in case the votes were equal the election should be not by lot but by age, and this was at first agreed to. But later on doubts arose, and the wording of the text was adopted.

It was at first provided that the appointment of the president should take place every three years. According to the present wording the period for which the president is elected is fixed by the rules of the Court.

| Article 9 | Article 9 |
| --- | --- |
| Les juges de la Cour de justice arbitrale reçoivent une indemnité annuelle de six mille florins néerlandais. Cette indemnité est payée à l'expiration de chaque semestre à dater du jour de la première réunion de la Cour. | The judges of the Judicial Arbitration Court receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time. |
| Pendant l'exercice de leurs fonctions au cours des sessions ou dans les cas spéciaux prévus par la présente Convention, ils touchent une somme de cent florins par jour. Il leur est alloué, en outre, une indemnité de voyage fixée d'après les règlements de leur pays. Les dispositions du présent alinéa s'appliquent aussi aux juges suppléants remplaçant les juges. | In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins *per diem*. They are further entitled to receive a travelling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge. |

[1] p. 613.

Ces allocations, comprises dans les frais généraux de la Cour, prévus par l'article 31, sont versées par l'entremise du Bureau international institué par la Convention pour le règlement pacifique des conflits internationaux.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau created by the Convention for the pacific settlement of international disputes.

In the discussions at The Hague a dispute arose as to the honoraria to be given to the judges. Choate [1] held that the sum of 6,000 florins a year was too small in consideration of the fact that many of the judges would be obliged to come from China, Japan and South America. But Crowe [1] observed that travelling expenses were especially provided for. Later on, Choate [2] returned once more to the question and wanted to have the honorarium fixed at 10,000 florins. He pointed out that people would lose respect for the Court if the judges were too poorly paid. Thereupon Crowe observed that most of the judges would receive in addition the salaries which they drew as judges in their own country. Lammasch [3] pointed out that if the salary was too high unworthy persons might be attracted, and that, above all, the high honour of the position of an international judge should be taken into consideration. The other delegates voted with Lammasch.

The honorarium of 6,000 florins goes only to the judges, not to the deputy judges. It must be regarded as a requital for the necessity under which the judges are to hold themselves ready at all times to go to The Hague, should a case come up for decision.

In addition to the 6,000 florins the judges receive during the exercise of their functions the sum of 100 florins *per diem*. Moreover, their travelling expenses are paid. The

[1] p. 666. [2] p. 680. [3] p. 681.

amount of the latter is determined in accordance with the regulations of their own country. The same provisions hold good for the deputy judges when acting as judges.

In the first draft the above-mentioned sums were to be paid by the contracting states according to the proportion in which they shared the expenses of the Universal Postal Union; as the text reads the payments are to be made by the International Bureau in accordance with a special agreement to be later entered into between the contracting parties.

| Article 10 | Article 10 |
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| Les juges ne peuvent recevoir de leur propre Gouvernement ou de celui d'une autre puissance aucune rémunération pour des services rentrant dans leurs devoirs comme membres de la Cour. | The judges may not accept from their own Government or from that of any other power any remuneration for services connected with their duties in their capacity of members of the Court. |

This article constitutes a further guarantee for the impartiality of the judges. In so far as the judges are national officials or university professors they draw naturally their salary as such. Only that remuneration from their government is forbidden which would be given in return for work connected with their duties upon the international court.

The provisions of the article are applicable not only to the duties of the judges upon the Court, but also to the services which they render as members of the delegation or of a commission of inquiry.

| Article 11 | Article 11 |
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| La Cour de justice arbitrale a son siège à La Haye et ne peut, sauf le cas de force majeure, le transporter ailleurs. | The seat of the Judicial Arbitration Court is at The Hague, and cannot be transferred, unless absolutely obliged by circumstances, elsewhere. |

La délégation peut, avec l'assentiment des parties, choisir un autre lieu pour ses réunions si des circonstances particulières l'exigent.

The delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

A permanent judicial court is inconceivable without a fixed place where all its sessions are held. Only in cases of *force majeure*, e. g., in the case of an epidemic, a war, &c., may the seat of the Court be transferred.[1] It is otherwise with respect to the delegation, the purpose of which is the quickest possible settlement especially of the smaller disputes. It can transfer its seat if (1) the parties agree and (2) special circumstances require it. In this case there need be no question of *force majeure*; mere convenience is enough.

The delegation has complete freedom to hold its sessions where it will, particularly when it acts as a commission of inquiry in accordance with Article 20. It is precisely the determination of facts which frequently requires local investigation, &c. The agreement of the parties is, however, necessary.

Article 12

Le Conseil administratif remplit à l'égard de la Cour de justice arbitrale les fonctions qu'il remplit à l'égard de la Cour permanente d'arbitrage.

Article 12

The Administrative Council fulfils with regard to the Judicial Arbitration Court the same functions as to the Permanent Court of Arbitration.

This article also indicates the connexion between the old Permanent Court and the new Judicial Court.

Concerning the duties of the Administrative Council,

[1] See Article 60 of the Convention for the pacific settlement of international disputes.

see pages 89 et seq. of my commentary upon the Convention for the pacific settlement of international disputes.

Article 13

Le Bureau international sert de greffe à la Cour de justice arbitrale et doit mettre ses locaux et son organisation à la disposition de la Cour. Il a la garde des archives et la gestion des affaires administratives.

Le secrétaire-général du Bureau remplit les fonctions de greffier.

Les secrétaires adjoints au greffier, les traducteurs et les sténographes nécessaires sont désignés et assermentés par la Cour.

Article 13

The International Bureau acts as registry to the Judicial Arbitration Court, and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary-general of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

Like the Administrative Council, the International Bureau is common to the old Permanent Court and the new Judicial Court. Concerning the International Bureau see p. 66 of my commentary upon the Convention for the pacific settlement of international disputes. As in numerous cases thus far translators and stenographers have been shown to be necessary, the present Convention provides expressly for the presence of these assistants. The fact that the Convention considers translators necessary is a proof that the knowledge of foreign languages possessed by the judges has not always been adequate to meet the difficulties arising from them.

Article 14

La Cour se réunit en session une fois par an. La session commence le troisième

Article 14

The Court meets in session once a year. The session opens the third Wednesday

mercredi de juin et dure tant que l'ordre du jour n'aura pas été épuisé.

La Cour ne se réunit pas en session, si la délégation estime que cette réunion n'est pas nécessaire. Toutefois, si une puissance est partie à un litige actuellement pendant devant la Cour et dont l'instruction est terminée ou va être terminée, elle a le droit d'exiger que la session ait lieu.

En cas de nécessité, la délégation peut convoquer la Cour en session extraordinaire.

in June, and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the Court in extraordinary session.

As Scott points out in his report [1] the provisions of this article have an important bearing upon the permanence and impartiality of the Court, which are its chief attributes.

The United States draft had provided that the judges should not only be permanently ready to settle international disputes, but should also be in residence at The Hague. It was thought that in this way the judges could best be gradually freed from national prejudices. But many feared that a regulation of that kind would be very inconvenient for the judges, and that it would contribute very little to increase the respect for the Court if in the first years only a few disputes should be referred to it. But Marschall declared that, on the contrary, it was to be hoped that too many disputes would be referred to the Court, because there were numerous cases reposing in the chancelleries of the governments. Choate thought that the

[1] Vol. i, p. 373.

fact should, after all, be reckoned with that many disputes would not be referred to the Court until it had won general confidence; but this was no objection to having the judges already in permanent residence at The Hague. Nevertheless, the suggestion that the judges should not permanently reside at The Hague was set aside, and it was decided to have plenary sessions only.[1]

It was at first sought to provide for two plenary sessions of the Court each year. But Asser and d'Oliveira considered that two sessions were too many.[2] Asser thought that most disputes would be referred to the delegation, and that frequent sessions of the court would be accordingly unnecessary. A yearly session was determined upon, but it was insisted that difficult disputes should in no case be entrusted to the delegation, but to the Court itself.

D'Oliveira thereupon proposed that special sessions of the Court should be held every five or six years, at which all the powers should be represented. At these sessions the members of the Court were to exchange their views upon questions of international law. But Marschall, Fry and Lammasch [3] considered it dangerous to have the judges express abstract opinions upon questions upon which they would later on be obliged to give an opinion in concrete cases.

The opening session of the Court was fixed for the day which would coincide as far as possible with the date of the opening of the Second Hague Peace Conference.

The draft provided that the Court should not meet in session if the delegation considered that the cases on hand did not justify having the Court meet. But Tornielli expressed the fear that the delegation might misuse its

[1] See Schücking, *op. cit.*, p. 156. [2] p. 616. [3] p. 617.

power and prevent the meeting of the Court. Accordingly, every state which has a case pending before the Court, the pleadings in which are closed or are about to be closed, is given the right to insist that the session be held, if the delegation has not thought it necessary. Provision is made therefore in this article that the Court shall meet yearly if necessary. It depends only upon the number of disputes whether the Court shall be in continuous session at The Hague.

Article 15

Un compte-rendu des travaux de la Cour sera dressé chaque année par la délégation. Ce compte-rendu sera transmis aux puissances contractantes par l'intermédiaire du Bureau international. Il sera communiqué aussi à tous les juges et juges suppléants de la Cour.

Article 15

A report of the doings of the Court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting powers through the International Bureau. It shall also be communicated to the judges and the deputy judges of the Court.

Whereas the report of the work of the old Permanent Court is prepared by the Administrative Council, the work of drawing up the report of the new Court is in the hands of the delegation.

The report will include in particular the decisions of the Court; and for this very reason it will be of special importance.

The draft at first provided that the report should be turned over by the delegation to the Administrative Council; but it was feared that if this were done the Judicial Court would appear to be subordinate to some extent to the Administrative Council.

The report may not criticize the work of the Court.[1]

[1] p. 670.

| Article 16 | Article 16 |
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| Les juges et les juges suppléants, membres de la Cour de justice arbitrale, peuvent aussi être nommés aux fonctions de juge et de juge suppléant dans la Cour internationale des prises. | The judges and deputy judges, members of the Judicial Arbitration Court, can also exercise the functions of judge and deputy judge in the International Prize Court. |

As there is a connexion between the new Judicial Court and the old Permanent Court, so also is there to be a connexion between the new Judicial Court and the International Prize Court. Article 16 has its origin in this idea.[1]

| *Titre II. Compétence et procédure* | *Part II. Competence and Procedure* |
| --- | --- |
| Article 17 | Article 17 |
| La Cour de justice arbitrale est compétente pour tous les cas qui sont portés devant elle, en vertu d'une stipulation générale d'arbitrage ou d'un accord spécial. | The Judicial Arbitration Court is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement. |

The British-German-United States proposal desired to make the Court obligatory for all disputes which, in accordance with a general treaty of arbitration entered into before the ratification of this Convention, were to be submitted to the Permanent Court of Arbitration. But Fusinato [2] urged the objection that this would constitute a preference for the new Judicial Court over the old Court of Arbitration; and it also involved an alteration of the provisions of the general arbitration treaties without the consent of the parties. Martens, Renault, and Fry agreed

[1] See Schücking, *op. cit.*, pp. 104 et seq.

[2] p. 628.

with him, while Asser supported the above-mentioned proposal. It was finally decided to suppress that provision, the committee being of the opinion of Renault that the new Judicial Court, when it had won confidence, would come to be preferred on its own account.

A German proposal had sought to have the Court declared competent 'to revise the decisions of arbitration courts and the reports of commissions of inquiry, as well as to determine the rights and duties resulting therefrom, in all cases in which the parties, in accordance with a general treaty or a special agreement, resort to the Court for that purpose'. In this proposal also Fry,[1] Bourgeois,[2] and Choate [2] saw a preference for the Judicial Court over the Permanent Court of Arbitration, and their views were warmly supported by Martens,[3] the vigorous opponent of the idea of the revision of decisions. The latter feared that such a provision would only encourage the parties to question the revised decisions. Renault [4] objected to the proposal that the report of a commission of inquiry should be reviewed by a court. But Kriege thought that it need only be said that the Judicial Court should in that instance act as a commission of inquiry on appeal, not as a court. Apropos of the remark made by Fusinato [5] that the revision of an arbitral award should be made by the same court which rendered the award, Kriege declared [2] that it might happen that the judges of the first court would be prevented from acting upon the second court; moreover, the parties could enter into an express agreement in the *compromis* looking to a revision of the decision by the new Judicial Court. The German proposal was finally struck out.

[1] pp. 628, 630. [2] p. 630. [3] pp. 629 et seq.
[4] p. 629. [5] p. 628.

It was expressly laid down by Bourgeois [1] that 'a general undertaking to have recourse to arbitration' was to be understood to include arbitral clauses in treaties.

| Article 18 | Article 18 |
| --- | --- |
| La délégation est compétente : | The delegation is competent : |
| 1° pour juger les cas d'arbitrage visés à l'article précédent, si les parties sont d'accord pour réclamer l'application de la procédure sommaire, réglée au Titre IV, Chapitre 4 de la Convention pour le règlement pacifique des conflits internationaux. | 1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part IV, Chapter IV, of the Convention for the pacific settlement of international disputes is to be applied. |
| 2° pour procéder à une enquête en vertu et en conformité du Titre III de la dite Convention en tant que la délégation en est chargée par les parties agissant d'un commun accord. Avec l'assentiment des parties et par dérogation à l'article 7, alinéa 1, les membres de la délégation ayant pris part à l'enquête peuvent siéger comme juges, si le litige est soumis à l'arbitrage de la Cour ou de la délégation elle-même. | 2. To hold an inquiry under and in accordance with Part III of the said Convention, in so far as the delegation is entrusted with such inquiry by the parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute is submitted to the arbitration of the Court or of the delegation itself. |

Whereas the preceding article deals with the jurisdiction of the Judicial Court, the present article determines the jurisdiction of the delegation. The summary procedure can be undertaken in connexion with the old Court of

[1] p. 631.

Arbitration as well as with the new Judicial Court. The parties have complete freedom in this respect, and no preference for the delegation is to be created. With regard to the summary procedure the rules of the Convention for the pacific settlement of international disputes (Articles 86–90) are to be applied, unless the parties make some other provision.

A proposal made by Asser and Martens,[1] according to which all other disputes were to be referred to the delegation under agreement of the parties, was rejected, since in the interest of the Judicial Court it was not desired to extend too far the jurisdiction of the delegation; the Judicial Court, so it was pointed out—in particular by Crowe and Bourgeois, was to develop international law, and it would not contribute to that end if the settlement of the most important questions were to be turned over to the delegation, which consisted only of three persons.

With respect to No. 2, Lammasch urged the objection that the functions of a commission of inquiry were being assigned to a judicial court. He pointed out that a court was in the habit of deciding legal disputes, and would with difficulty restrict itself to the determination of facts. But Fry, Kriege, Renault, and Martens would not admit that, and Lammasch's proposal was not adopted.

Asser desired that the members of the delegation should receive a special honorarium for their work upon the commission of inquiry.[2] But this was objected to in particular by Choate. He said that a special compensation was justly granted only to those who were not appointed from among the members of the Judicial Court.[3] These last must be paid by the parties themselves. On the

[1] p. 673. [2] p. 635. [3] See Article 20, paragraph 2.

contrary, the other members of a commission of inquiry, who belong to the delegation of the Judicial Court, could demand no further honoraria than the salary fixed in Article 8.

Renault and Martens [1] raised the question whether the reference of an affair to the new Judicial Court after the report of the commission of inquiry would not operate to disqualify the members of the commission from becoming members of the Court. Renault advocated the presence of the judges who had taken part in the commission of inquiry, since they could render valuable service upon the Court. Asser also agreed to this, referring to the recent legislation in certain countries which provided that the judge who had undertaken an inquiry should sit upon the Court. The committee was in general of the opinion that the duties of a judge were entirely distinct from those of a commissioner. Accordingly the last paragraph of the article which, when the parties are agreed upon it, makes an exception of the provision of Article 7, paragraph 1, was allowed to stand.

| Article 19 | Article 19 |
| --- | --- |
| La délégation est, en outre, compétente pour l'établissement du compromis visé par l'article 52 de la Convention pour le règlement pacifique des conflits internationaux, si les parties sont d'accord pour s'en remettre à la Cour. | The delegation is also competent to settle the *compromis* referred to in Article 52 of the Convention for the pacific settlement of international disputes if the parties are agreed to leave it to the Court. |
| Elle est également compétente, même si la demande est faite seulement par l'une des parties, après qu'un accord par la voie diplomatique | It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach |

[1] p. 635.

a été vainement essayé, quand il s'agit :

1° d'un différend rentrant dans un traité d'arbitrage général conclu ou renouvelé après la mise en vigueur de cette Convention et qui prévoit pour chaque différend un compromis, et n'exclut pour l'établissement de ce dernier ni explicitement ni implicitement la compétence de la délégation. Toutefois, le recours à la Cour n'a pas lieu si l'autre partie déclare qu'à son avis le différend n'appartient pas à la catégorie des questions à soumettre à un arbitrage obligatoire, à moins que le traité d'arbitrage ne confère au tribunal arbitral le pouvoir de décider cette question préalable ;

2° d'un différend provenant de dettes contractuelles réclamées à une puissance par une autre puissance comme dues à ses nationaux, et pour la solution duquel l'offre d'arbitrage a été acceptée. Cette disposition n'est pas applicable si l'acceptation a été subordonnée à la condition que le compromis soit établi selon un autre mode.

an understanding through the diplomatic channel, in the case of :

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one power by another power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

See in connexion with this article, pages 96 et seq. of my commentary upon the Convention for the pacific settlement of international disputes ; also page 92 above.

In paragraph one, Asser [1] wished to have inserted the additional provision that the delegation should also be competent to regulate special points of the *compromis*. But it was thought that it could do so even without such a provision.

Paragraph two, no. 1, had its origin in a German proposal. Marschall [2] called attention to the case in which a dispute might in the opinion of both parties come under a permanent treaty of arbitration, but in which an agreement upon the *compromis* could not be reached ; under such conditions, he said, an obligatory *compromis* was the necessary complement of the obligatory arbitration treaty; but that such a compulsory *compromis* could not naturally be enforced, if one of the parties asserted that the case affected its honour or its vital interests. In consequence of this limitation Fry [3] and Martens [4] considered that a legal obligation was entirely out of place. Choate [4] declared that he could not accept the German proposal because the Senate of the United States would reject such an obligation, which would take from it its right to ratify each individual *compromis*. The German proposal was, however, agreed to, subject to the exception that the delegation should not be competent to settle a compulsory *compromis* in those cases in which a general arbitration treaty should have been entered into before the present Convention came into force.[5] Thereupon Choate,[6] in the name of the United States, declared himself in favour of the new provision.

According to the Convention respecting the limitation of the employment of force for the recovery of contract debts the use of force is only permitted when, in consequence

[1] p. 638. [2] p. 639. [3] p. 640.
[4] p. 641. [5] pp. 651, 675. [6] p. 676.

of the conduct of the debtor state, a *compromis* cannot be agreed upon. In order to facilitate the settlement of the *compromis* in such cases, the delegation was declared competent to settle the *compromis* in case diplomatic negotiations should have produced no result and one of the parties should make a request to that effect.

| Article 20 | Article 20 |
| --- | --- |
| Chacune des parties a le droit de désigner un juge de la Cour pour prendre part, avec voix délibérative, à l'examen de l'affaire soumise à la délégation. | Each of the parties concerned may nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the delegation. |
| Si la délégation fonctionne en qualité de commission d'enquête, ce mandat peut être confié à des personnes prises en dehors des juges de la Cour. Les frais de déplacement et la rétribution à allouer aux dites personnes sont fixés et supportés par les puissances qui les ont nommés. | If the delegation acts as a commission of inquiry, this task may be entrusted to persons other than the judges of the Court. The travelling expenses and remuneration to be given to the said persons are fixed and borne by the powers appointing them. |

The first paragraph contemplates the possibility of establishing without great difficulty a larger court of five judges, by having each of the parties appoint a judge from among the members of the Judicial Court. It is not stated clearly whether these judges may be nationals of the parties. This question can scarcely be answered in the negative.[1]

As persons who are not jurists can also be of service upon a commission of inquiry, paragraph 2 provides that persons who do not belong to the Judicial Court may be chosen for the commission of inquiry.

[1] See Article 30, paragraph 2.

With regard to question of cost in the second sentence of the last paragraph, see the concluding remarks upon Article 18.

| Article 21 | Article 21 |
| --- | --- |
| L'accès de la Cour de justice arbitrale, instituée par la présente Convention, n'est ouvert qu'aux puissances contractantes. | The contracting powers only may have access to the Judicial Arbitration Court set up by the present Convention. |

Asser [1] had inquired whether the International Judicial Court should be open only to contracting states or to other powers as well, and he recommended that they should restrict it to the contracting states. This proposal was agreed to, but it was specially laid down that only those states should be considered as contracting states which should later on ratify the Convention, and not those which had merely signed it. This was due especially to the fact that the access to the Court was gratuitous, and accordingly it did not seem fair that the contracting states should also bear the burden of the expenses incurred by the Court in the settlement of disputes between states not parties to the Convention.[2]

| Article 22 | Article 22 |
| --- | --- |
| La Cour de justice arbitrale suit les règles de procédure édictées par la Convention pour le règlement pacifique des conflits internationaux, sauf ce qui est prescrit par la présente Convention. | The Judicial Arbitration Court follows the rules of procedure laid down in the Convention for the pacific settlement of international disputes, except in so far as the procedure is laid down in the present Convention. |

The preceding article also creates a connexion between the old Court of Arbitration and the new Judicial Court,

[1] p. 633. [2] p. 677.

by making the same rules of procedure applicable to both.

See in addition Articles 51 et seq. of the Convention for the pacific settlement of international disputes.

| Article 23 | Article 23 |
| --- | --- |
| La Cour décide du choix de la langue dont elle fera usage, et des langues dont l'emploi sera autorisé devant elle. | The Court determines what language it will itself use and what languages may be used before it. |

According to Article 52 of the Convention for the pacific settlement of international disputes, the parties themselves determine what languages are to be used. Such a procedure, however, would in the case of a judicial court of seventeen members lead to difficulties. For this reason the Court is given exclusive right to decide the question of languages.

Upon the question of languages, compare in addition the statements made on pages 88 et seq. above, and also pages 110 et seq. of my commentary upon the Convention for the pacific settlement of international disputes.

| Article 24 | Article 24 |
| --- | --- |
| Le Bureau international sert d'intermédiaire pour toutes les communications à faire aux juges au cours de l'instruction prévue à l'article 63, alinéa 2, de la Convention pour le règlement pacifique des conflits internationaux. | The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 63, paragraph 2, of the Convention for the pacific settlement of international disputes. |

According to Article 52 of the Convention for the pacific settlement of international disputes, the form, the order, and the time for the communication of the cases, counter-

cases, &c., of the parties are fixed in the *compromis*. This provision did not appear applicable in connexion with the judicial court, because it could not be decided by a court of seventeen members until the individual cases were carefully studied. Accordingly the above general provision was adopted.

Article 25

Pour toutes les notifications à faire, notamment aux parties, aux témoins et aux experts, la Cour peut s'adresser directement au Gouvernement de la puissance sur le territoire de laquelle la notification doit être effectuée. Il en est de même s'il s'agit de faire procéder à l'établissement de tout moyen de preuve.

Les requêtes adressées à cet effet ne peuvent être refusées que si la puissance requise les juge de nature à porter atteinte à sa souveraineté ou à sa sécurité. S'il est donné suite à la requête, les frais ne comprennent que les dépenses d'exécution réellement effectuées.

La Cour a également la faculté de recourir à l'intermédiaire de la puissance sur le territoire de laquelle elle a son siège.

Les notifications à faire aux parties dans le lieu où siège la Cour peuvent être exécutées par le Bureau international.

Article 25

For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the state on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

This article is an amplification of Article 24 of the Convention for the pacific settlement of international disputes. The contracting states are to assist the Judicial Court in the accomplishment of its purpose. Accordingly the fees must represent only expenses actually incurred, for recourse to the Court must not be made a source of revenue.

| Article 26 | Article 26 |
| --- | --- |
| Les débats sont dirigés par le président ou le vice-président et, en cas d'absence ou d'empêchement de l'un et de l'autre, par le plus ancien des juges présents. | The discussions are under the control of the president or vice-president, or, in case they are absent or cannot act, of the senior judge present. |
| Le juge nommé par une des parties ne peut siéger comme président. | The judge appointed by one of the parties cannot preside. |

There are no remarks to be made upon paragraph one.

Although it was not desired to prohibit the presence of nationals upon the large Court of seventeen members, yet they were rightly denied the competency to direct the discussions, since the regularity of the procedure would otherwise be disturbed. Such is the origin of the second paragraph.

| Article 27 | Article 27 |
| --- | --- |
| Les délibérations de la Cour ont lieu à huis clos et restent secrètes. | The Court considers its decisions in private, and the proceedings are secret. |
| Toute décision est prise à la majorité des juges présents. Si la Cour siège en nombre pair et qu'il y ait partage des voix, la voix du dernier des juges, dans l'ordre de préséance établi d'après l'article 4, alinéa 1, ne sera pas comptée. | All decisions are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4 paragraph 1, is not counted. |

Paragraph 1 follows word for word Article 78, paragraph 1, of the Convention for the pacific settlement of international disputes. In paragraph 2, it is expressly said, 'of the judges present'. This is equivalent to saying that the decision can also be rendered even if all the judges are not present, contrary to the provision of Article 78, paragraph 2, of the Convention for the pacific settlement of international disputes. The fact that the number of judges was very great was sufficient reason for not placing special importance upon the presence of the whole body of judges. But if all the judges do not take part in a case, it may happen that the number of judges will be even and a tie vote result. It was desired that in such a case the vote of the president should not be the deciding one, because he would otherwise have too great power; it was provided, therefore, that the vote of the youngest judge should not be counted.[1]

| Article 28 | Article 28 |
| --- | --- |
| Les arrêts de la Cour doivent être motivés. Ils mentionnent les noms des juges qui y ont participé; ils sont signés par le président et par le greffier. | The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar. |

This article corresponds to Article 79 of the Convention for the pacific settlement of international disputes; see page 137 of my commentary. Those judges who do not agree with the majority are not called upon to record their dissenting opinion. But in order not to force these judges to sign the decision, provision is made that it is to be signed only by the president and the registrar. The signature of the president does not express his opinion, but merely

[1] See also Article 30, paragraph 2.

proves the document to be authentic. Copies of the decision will merely be signed by the registrar.

| Article 29 | Article 29 |
| --- | --- |
| Chaque partie supporte ses propres frais et une part égale des frais spéciaux de l'instance. | Each party pays its own costs and an equal share of the costs of the trial. |

This article corresponds to Article 85 of the Convention for the pacific settlement of international disputes and calls for no special remarks.

| Article 30 | Article 30 |
| --- | --- |
| Les dispositions des articles 21 à 29 seront appliquées par analogie dans la procédure devant la délégation.<br>Lorsque le droit d'adjoindre un membre à la délégation n'a été exercé que par une seule partie, la voix du membre adjoint n'est pas comptée, s'il y a partage de voix. | The provisions of Articles 21 to 29 are applicable by analogy to the procedure before the delegation.<br>When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of the member attached is not recorded if the votes are evenly divided. |

As the delegation is only a branch of the Judicial Court, the same rules of procedure must be applied by it as by the Court.

In case only one of the parties makes use of the right granted by Article 20, paragraph 1, it may easily happen that the votes will be equally divided. In that case the provision of Article 27, paragraph 2, that the vote of the youngest judge shall be set aside, does not hold good, but rather the vote of the member appointed by the one party is excluded. This provision is a just one, as it is to be assumed that the member appointed by state *A* will be

very reluctant to vote against state *A*, and accordingly will be more or less biased.

| Article 31 | Article 31 |
| --- | --- |
| Les frais généraux de la Cour sont supportés par les puissances contractantes. | The general expenses of the Court are borne by the contracting powers. |
| Le Conseil administratif s'adresse aux puissances pour obtenir les fonds nécessaires au fonctionnement de la Cour. | The Administrative Council applies to the powers to obtain the funds requisite for the working of the Court. |

As the Judicial Court is established in the interest of the contracting parties as a body, it is just that the expenses of the Court shall be borne by them in common. The Second Hague Peace Conference was of the opinion that those states which had more judges upon the Court should bear the larger share of the expenses ; but as an agreement could not be reached upon the composition of the Court, no method of apportionment was determined upon.

Compare Article 50 of the Convention for the pacific settlement of international disputes.

| Article 32 | Article 32 |
| --- | --- |
| La Cour fait elle-même son règlement d'ordre intérieur qui doit être communiqué aux puissances contractantes. | The Court itself draws up its own rules of procedure, which must be communicated to the contracting powers. |
| Après la ratification de la présente Convention, la Cour se réunira aussitôt que possible pour élaborer ce règlement, pour élire le président et le vice-président, ainsi que pour désigner les membres de la délégation. | After the ratification of the present Convention the Court shall meet as early as possible in order to elaborate these rules, elect the president and vice-president, and appoint the members of the delegation. |

As the rules of procedure of this Convention, as well as those referred to in Article 52 of the Convention for the

pacific settlement of international disputes, only comprise the main outlines of a procedure, it was necessary to provide that the Judicial Court should promptly draw up in detail its own rules of procedure. Accordingly, as soon as it has obtained some experience, it must draw up its own rules of procedure. These rules are to be communicated to the contracting powers, in order that they may be able to regulate their procedure accordingly.

Paragraph 2 provides that the Judicial Court shall meet as soon as possible.

| Article 33 | Article 33 |
| --- | --- |
| La Cour peut proposer des modifications à apporter aux dispositions de la présente Convention qui concernent la procédure. Ces propositions sont communiquées par l'intermédiaire du Gouvernement des Pays-Bas aux puissances contractantes qui se concerteront sur la suite à y donner. | The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the contracting powers, which will consider together as to the measures to be taken. |

Article 32 makes provision for supplementing the general rules of procedure, and for modifying them as well. These modifications cannot be made by the Judicial Court of its own accord, since it possesses no legislative power. It may, however, make proposals, the adoption of which is left to the decision of the powers.

| *Titre III. Dispositions finales* | *Part III. Final Provisions* |
| --- | --- |
| Article 34 | Article 34 |
| La présente Convention sera ratifiée dans le plus bref délai possible. | The present Convention shall be ratified as soon as possible. |

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les puissances signataires.

The ratification shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory powers.

Article 35

La Convention entrera en vigueur six mois après sa ratification.

Elle aura une durée de douze ans, et sera renouvelée tacitement de douze ans en douze ans, sauf dénonciation.

La dénonciation devra être notifiée, au moins deux ans avant l'expiration de chaque période, au Gouvernement des Pays-Bas, qui en donnera connaissance aux autres puissances.

La dénonciation ne produira effet qu'à l'égard de la puissance qui l'aura notifiée. La Convention restera exécutoire dans les rapports entre les autres puissances.

Article 35

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other powers.

The denunciation shall only have effect in regard to the notifying power. The Convention shall continue in force as far as the other powers are concerned.

## CHAPTER X

### THE PROSPECT FOR THE CREATION OF AN INTERNATIONAL COURT OF JUSTICE

THE almost unanimous acceptance of the fundamental principles of the Draft Convention for the creation of a Judicial Arbitration Court adopted at the Second Hague Peace Conference, a project which was also advocated by the Universal Peace Congress at Munich in 1907, indicates that the possibility of the creation of an international court of justice at the next Hague Peace Conference is exceedingly great.

The Government and the people of the United States have since the time of the Second Hague Peace Conference fought their hardest for the establishment of an international court of justice. In this connexion the project of Secretary Knox is once more particularly deserving of attention. All American writers of repute advocate the new Judicial Court, and in the year 1910 the partisans of this great idea formed the American Society for the Judicial Settlement of International Disputes. This society has among its members many distinguished citizens of the United States. Its honorary president is President Taft, its president, Scott, its vice-president, Hammond, and its secretary, Marburg. The object of the society is the furtherance of the project of a judicial tribunal, which shall do for the civilized world what the ordinary courts of justice do for the citizens of a state. Moreover, the society will, after the creation of the judicial tribunal, labour with all its strength to have the states resort to the Judicial

Court as frequently as possible. The society has, besides, nothing to do with peace propaganda. It does not strive after disarmament, but is convinced that, as the number of international disputes settled by judicial methods becomes more and more numerous, the advent of the era of disarmament will be hastened. The first meeting of the society at Washington from December 15–17, 1910, was a great demonstration. In the table of contents of the *Proceedings* of this meeting, which cover 400 pages, it can be seen that the President of the United States, the French Ambassador, two former Secretaries of State, the presidents of three of the leading universities of the United States, many former diplomats, &c., were among the speakers at the various sessions.

During the period preceding the founding of the American Society for Judicial Settlement of International Disputes, the American Society of International Law, as well as the Lake Mohonk Conferences, discussed the project of a permanent international court of justice.

As has been justly pointed out, in particular by Nys [1] and Balch,[2] no state of the world has shown greater zeal in the cause of arbitration than has the United States. The great perseverance which this nation has shown in the pursuit of its high and admirable ideal justifies the hope that in the future as well it will continue to pursue the same noble path for the good of mankind.

The words of President Butler, spoken at the opening of the Fifteenth Lake Mohonk Conference on May 19, 1909, have particular application to an international judiciary:

> We Americans have a peculiar responsibility toward the political organization of the world. Whether we

[1] *The Necessity of a Permanent Tribunal*, p. 27.

[2] *Revue de droit international*, 1908, p. 398.

recognize it or not we are universally looked to, if not to lead in this undertaking, at least to contribute powerfully toward it.

In doing so the United States will have all the fewer difficulties to overcome, in that writers outside of the United States are in favour of the permanent court. In particular, the French are entirely in favour of the project.

Apart from Germany, I know of but two writers who are opposed to the new Judicial Court—namely, the Englishman, Baty,[1] and the Cuban, Bustamante.[2] But these writers stand alone in their view upon this question. In Great Britain the idea of an international judicial court is advocated in particular by Oppenheim,[3] Lawrence,[4] Higgins,[5] Whittuck,[6] Darby, Barclay, Stead and others. Of the Dutchmen who have expressed themselves in this connexion, in addition to Asser I may mention den Beer Poortugael, who in the *Onze Eeuw*[7] advocates with much enthusiasm the Judicial Arbitration Court, van der Mandere,[8] de Louter, who, in his article 'The Future of International Law',[9] advocated the Permanent Court of Justice and abandoned his earlier contrary opinion,[10] and finally van Karnebeek, the honoured vice-president of the First

[1] *International Law*, pp. 9 et seq.; see *La Paix par le Droit*, 1911, p. 193, where Baty also objects to the Knox proposal upon general grounds. He further says in the same article that the National Peace Council in Great Britain and Tryon in the United States have called attention to the dangers of the new Judicial Court.

[2] *La Seconde Conférence*, pp. 204 et seq.

[3] *Zukunft des Völkerrechtes*, p. 47.

[4] *International Problems and Hague Conferences*, p 75.

[5] *The Hague Peace Conferences*, p. 517.

[6] *International Documents*, p. xvii.

[7] April, 1911, p. 46,

[8] *Vragen des Tijds*, 1910, pp. 376 et seq.

[9] 1912.

[10] *Het stellig volkenrecht*, vol. ii, p. 158.

Hague Conference, who, in an address on the occasion of the laying of the corner-stone of the Peace Palace, expressed the wish that a permanent court in the true sense of the word would soon be established. In Germany a violent conflict of opinion exists upon the question of a permanent court of justice; but the number of those in favour of it outweighs the others by far. I shall place the names of the German-Austrian writers who are in favour of the Judicial Court side by side with the names of those who are opposed to it.

*In Favour of the Judicial Court*

1. Eickhoff: *Die internationale Schiedsgerichtsbewegung*, 1910, p. 30.
2. Fried: In all his books and articles.
3. Harmening: *Weltparlament*, pp. 20 et seq.
4. Kohler: In an address delivered on October 20, 1911, before the Cologne Society for the Development of Legal and Political Sciences.
5. Meurer: See Year Book of the Carnegie Endowment for International Peace, 1911, p. 133.
6. Lammasch: In *Das Recht*, 1911, p. 151.
7. Von Liszt: *Völkerrecht*, 1911, p. 151; *Das Wesen des völkerrechtlichen Staatenverbandes*, 1911, pp. 10 et seq.
8. Von Martitz: *Internationale Monatsschrift*, 1911, p. 162.

*Opposed to the Judicial Court*

1. Von Bar: *Berliner Tageblatt*, August 22, 1907.
2. Nippold: *Fortbildung des Verfahrens*, pp. 150 et seq.; *Zweite Haager Konferenz*, pp. 221 et seq.
3. Von Plener: *Interparliamentary Union*, 1908, p. 46.
4. Pohl: *Deutsche Prisengerichtsbarkeit*, p. 210.
5. Tettenborn: *Das Haager Schiedsgericht*, p. 55.
6. Zorn: *Zeitschrift für Politik*, vol. ii, p. 351; *Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit*, p. 44.

9. Schücking: op. cit., pp. 90 et seq.
10. Schlief: *Der Friede in Europa*, p. 275.
11. Sturm: *Psychologische Grundlage des Rechts*, p. 370.
12. Von Ullmann: *Völkerrecht*, p. 448; but see also p. 39, note 1.
13. Wehberg: *Kommentar zu dem Haager Abkommen*, p. 48.

It is noteworthy that, of all the members of the committee of examination of the arbitration commission of the First Hague Conference, Zorn was the only one to vote against the truly permanent Judicial Court.[1]

A commission of the Institute of International Law, consisting of Renault, Hagerup, Rolin, Scott, Westlake, Fauchille, Fromageot, Holland and von Bar, which met in 1911, adopted a resolution to the effect that the next Peace Conference should carry out the *vœu* of the Second Hague Conference relative to the creation of a judicial arbitration court.[2] The result of the meeting of the Interparliamentary Union at Ghent in September, 1912, will be awaited with great interest. A proposal concerning obligatory arbitration,[3] made by Zorn and already approved by the Interparliamentary Council, reads as follows:

The Hague Permanent Court of Arbitration has stood

[1] Shortly before the opening of the Second Peace Conference, White, the American delegate to the First Hague Peace Conference, declared at the Lake Mohonk Conference of 1907 that a truly permanent arbitration court had not been created in 1899 because it was believed that there was not enough work for it to do, and that he was of the conviction that the same reasons would prevent the adoption of the project of a permanent court of justice at the Second Conference (*Report*, pp. 30, 31).

[2] See *Revue de droit international*, 1911, p. 596. [3] Article 3.

> the test in the form given it by the First Hague Peace Conference. However, the erection of a permanent judicial court for all questions of international private law is to be recommended. . . .[1]

In this resolution the need of an international court of justice is therefore impliedly denied. The fact that three such important opponents of the international court of justice as Beernaert, von Plener and Zorn will play an important part in the deliberations of the Interparliamentary Union makes the adoption of this resolution not impossible. It is all the more necessary, therefore, to point out distinctly that neither Beernaert, von Plener nor Zorn have been able to adduce even the slightest valid reasons against the project here discussed, at least no reasons which have not been proved to be completely without foundation in the remarks we have made above. If Zorn's resolution were to be adopted the Interparliamentary Union would prove to the world that a majority of its members have failed to comprehend the significance of the latest development of international law.

Just as Martens once pointed out that there were three stages in the development of international arbitration, so it seems to me three stages can be distinguished in the progress towards an international judiciary. In the first stage disputes were merely disposed of in accordance with equity. In the second stage in which we now stand the demand that all disputes, as far as possible, shall be decided in a strictly legal way is calling for recognition, but there is still lacking a suitable organ to assist in the triumph of this idea. In the last period the institution that is needed for this purpose will be created in the form of the International Permanent Court of Justice.

[1] *Annuaire*, 1912, p. 77

To be sure, the International Court of Justice will not be a symbol of perpetual peace. We must reckon with the fact that the foundations of the old political international law will only break down slowly, and that the moral elements in the community of states will only gradually prevail with the progress of the economic and cultural unity of nations. Above all we must have patience and not be discouraged by the fact that great ideals can only be reached at a later day.

But the Permanent International Court of Justice will represent a very significant progress towards the goal of international organization. Its creation will necessarily be regarded as a striking victory of the modern peace movement, which has advocated it incessantly for decades. As the Hague Permanent Court of 1899 traces back to the report of La Fontaine on the occasion of the Universal Peace Congress at Antwerp, so the American proposal of an international court of justice found its first advocate in Hornby at that same Universal Peace Congress. The establishment of the International Court of Justice will strengthen the belief of thousands that the nations must hasten to an ever higher stage of their development and that their policies must assume gradually a nobler character. In this way it will once more be shown that all great ideas prevail in the course of the centuries, and mankind must only have perseverance in order to reach its highest goal.

# SUBJECT INDEX

(See also Contents)

# INDEX OF PERSONS